

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-  
WASHINGTON REGIONAL DISTRICT IN  
MONTGOMERY COUNTY, MARYLAND  
Office of Zoning and Administrative Hearings  
Stella B. Werner Council Office Building  
100 Maryland Avenue, Room 200  
Rockville, Maryland 20850  
(240) 777-6660

IN THE MATTER OF:  
THEODORE H. BUTZ, ET AL.  
Applicants

Thompson Butz  
Gary Unterberg  
Jennifer Russel  
Frank G. Bossong  
Kathryn Kubit  
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Wes Guckert

For the Application

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\*\*\*\*\*

Mary Jane Goodrick & Robert Goldberg, on behalf  
of the Greater Goshen Civic Assoc. (GGCA)  
Ron Wills  
William Hancock  
Community Participants in Opposition

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Zoning Application No. G-881

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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**I. CASE SUMMARY**

Applicants:	Theodore H. Butz, et al., owners of the property
LMA No. & Date of Filing:	G-881, filed April 29, 2009
Current Zone and Use:	Current Zone: RE-2                      Current Use: Farmland
Zoning and Use Sought:	Planned Retirement Community (P-R-C) Zone; Use: 140 age-restricted (50 years+) single-family homes (at least 85% detached) and a small community center, plus parking and internal roads. At least 12.5% of the homes ( <i>i.e.</i> , 18 units) will be MPDUs.
Location:	21901 Ridge Road, in Germantown, Maryland, just west of Ridge Road (MD 27), north of Brink Road and east of the Brink Meadows Subdivision. The site is identified as Parcel P429 on Maryland Tax Map FV 122 (a/k/a, the “Butz Property” or the “Water Tank Farm Property”), subject to the 1994 Clarksburg Master Plan and Hyattstown Special Study Area
Area to be Rezoned:	54.34909 acres gross tract; 49.4 acres net tract (4.9 acres dedicated)
Density in P-R-C Zone:	Permitted: 10 dwelling units (d.u.) / acre; Planned: 2.6 d.u. / acre
Green Area:	Required: 50%; Proposed: 50%
Parking:	Required: 2 per d.u.; Proposed 280 spaces (2 per d.u.), but final counts to be determined at Site Plan Review
Height:	Required: 100 feet or less; Proposed: 35 feet
Master Plan Consistency:	Hotly Contested. Technical Staff found non-compliance, but the Planning Board found substantial compliance. The 1994 Clarksburg Master Plan and Hyattstown Special Study Area did not recommend the P-R-C Zone for the site, but at the time the Master Plan was adopted, the Zone was not permitted on tracts this size, and public sewage was not available. The Zone was amended to allow its application to this size tract, and the area is planned for public sewer as Tier 2, in accordance with State law.
Neighborhood Response:	<p>Opposition by the Greater Goshen Civic Association (GGCA), the Clarksburg Civic Association (CCA) and numerous neighbors. Concerns include added density, Master Plan compliance, traffic impacts, lack of on-site recreational facilities, inadequate screening, noise, dust, light pollution, loss of pastoral scenery, breeding of mosquitoes in the proposed stormwater management ponds and effect on property values.</p> <p>Support from Elm Street Development (developer of Clarksburg Village), and a number of individual County residents (not neighbors) who desire more senior housing in the County</p>
Technical Staff Recommends:	Disapproval
Planning Board Recommends:	Approval
Hearing Examiner Recommends:	Approval, with the binding elements that have been added

## II. STATEMENT OF THE CASE

Application No. G-881, filed on April 29, 2009, requests reclassification of approximately 54.34909 acres of land (gross tract) in Germantown from the RE-2 Zone (Single-Family, Detached, on two-acre lots) to the Planned Retirement Community (P-R-C) Zone. The subject site is described as Parcel P429 on Maryland Tax Map FV 122, and is also known as the “Butz Property” or the “Water Tank Farm Property.” The property is located at 21901 Ridge Road, in Germantown, Maryland, just west of Ridge Road (MD 27), north of Brink Road and east of the Brink Meadows Subdivision. The property is owned by Applicants, Theodore H. Butz, et al., and bears a tax account number of 02-00030041.<sup>1</sup>

If approved, the site will be developed with 140 age-restricted, single-family homes<sup>2</sup> (at least 85% detached), a small community center, parking and internal roads. At least 12.5% of the homes (*i.e.*, 18 units) will be Moderately Priced Dwelling Units (MPDUs). The age restriction, in accordance with the P-R-C Zone’s requirements, will limit residence to those 50 years of age and older, and disabled relatives. Zoning Ordinance §59-C-7.44(a). The proposed development will be called “The Courts at Clarksburg” and will be subject to preliminary plan and site plan approval by the Planning Board.

The hearing in this case was initially scheduled for October 16, 2009 (Exhibit 26), but it was postponed twice at the Applicants’ request (Exhibits 27, 28, 32 and 33). The continuance order of September 17, 2009, indefinitely postponed the hearing in accordance with Applicants’ wishes. By letter of July 19, 2012, Applicants reactivated the case. Exhibit 34. A new informational mailing was sent to abutting and confronting property owners by the Applicants on August 8, 2012 (Exhibit 37), and a notice scheduling the hearing for January 14 and 18, 2013, was mailed out on December 6, 2012 (Exhibit 45(b)) and published in two newspapers on December 7, 2012 (Exhibits 45(c) and (d)).

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<sup>1</sup> In addition to Applicants’ deed, a copy of which is in the record as Exhibit 70, the Hearing Examiner takes official notice of Maryland tax record for Tax Account No. 02-00030041, which lists the Applicants as the property owners.

<sup>2</sup> The original development plan (Exhibit 8), filed in 2009, called for 221 dwelling units.



The application for rezoning was reviewed by the Technical Staff, and in a report dated December 7, 2012, Staff recommended denial of the application (Exhibits 46 and 53).<sup>3</sup> The Planning Board considered the application on December 20, 2012 and, by a vote of 5 to 0, recommended approval. The Board's recommendation is contained in a letter to the Hearing Examiner dated January 4, 2013. Exhibit 54.

This application is supported by Elm Street Development, the developer of Clarksburg Village (Exhibits 60, 80(c) and 97), and by a number of individual County residents (not immediate neighbors of the site) who desire more senior housing in the County. Exhibits 50, 58, 59, 73, 75, 76, 77, 81 and 82.<sup>4</sup> The application is opposed by the Greater Goshen Civic Association (GGCA), the Clarksburg Civic Association (CCA) and numerous neighbors. Exhibits 48(a), 51, 52(a) and 52(b). Nineteen individuals signed one of the opposition letters. Exhibit 52(a). Concerns expressed by the civic associations and the neighbors include the adding of density to the area, alleged Master Plan non-compliance, potential traffic impacts, lack of on-site recreational facilities, inadequate screening, noise, dust, light pollution, loss of pastoral scenery, possible breeding of mosquitoes in the proposed stormwater management ponds and effect on property values.

The public hearing was held, as scheduled, on January 14 and 18, 2013.<sup>5</sup> Seven witnesses were called by the Applicant, and opposition testimony was provided by Mary Jane Goodrick and Robert Goldberg, on behalf of the Greater Goshen Civic Association, as well as by neighbors Ron Wills and William Hancock, both of whom live in the adjacent Brink Meadows subdivision. The record was held open until February 5, 2013, to allow the Applicants the opportunity to file minor revisions to the development plan, and to give Technical Staff and the neighbors time to review and

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<sup>3</sup> The Technical Staff Report is quoted and paraphrased frequently herein.

<sup>4</sup> A number of e-mails and letters in support of the project were not admitted into evidence because they were either unsigned (Exhibits 57 and 74(a) and (b)) or filed after the hearing (Exhibits 98(a) – (d)), or both (Exhibits 99(a) – (k)).

<sup>5</sup> The January 14 transcript is cited as 1/14 Tr. xx, and the January 18 transcript is cited as 1/18 Tr. xx.

comment. The revised Development Plan was timely filed as Exhibit 94(a), and Technical Staff responded by e-mail on January 29, 2012, indicating that it had no objection to the language added. Exhibit 101. Staff added that the placement of the proposed MPDUs would be reviewed by the Department of Housing and Community Affairs in connection with Site Plan. The record closed as scheduled on February 5, 2013, with no additional comments by the neighbors.

This was not an easy case. The opposition's concerns about added density and compatibility are understandable, as is the negative recommendation by the Technical Staff. On the other hand, the approach of the Planning Board better reflects the underlying goals of the 1994 Clarksburg Master Plan. Given the developments since the Master Plan was approved; the changes in the environmental concerns regarding sewer hookups; the ability to provide significant screening for the immediate neighbors to improve compatibility; and the public interest in providing additional senior housing in the County, the Hearing Examiner finds that the proposed development satisfies the purpose and standards of the P-R-C Zone (provided that the Council approves unrestricted public sewer service for the property); meets the requirements set forth in Section 59-D-1.61 of the Zoning Ordinance; will be compatible with development in the surrounding area; is substantially consistent with the Clarksburg Master Plan; and will be in the public interest. The Hearing Examiner therefore recommends approval, as did the Planning Board. The Hearing Examiner also suggests that the Council Resolution note that a reduction in the size of the stormwater ponds to allow more screening on the west is not precluded, should the Planning Board determine that is advisable at Site Plan and Subdivision reviews.

### **III. FACTUAL BACKGROUND**

#### **A. Zoning History of the Subject Site**

The zoning history of the subject site was set forth in the Technical Staff report (Ex. 53, p. 3):

Upon the adoption of the 1958 Zoning Ordinance, the Property was incorporated into the Regional District and classified in the R-R (Rural Residential) Zone, which allowed lots no smaller than one-half acre. Zoning text amendment 73013, in 1973

renamed the R-R Zone to the R-200 Zone, and in 1974 this Property was reclassified to the R-200 Zone, per SMA F-925. Subsequently, this Property . . . [was] reclassified to the RE-2 Zone per SMA G-710, which implemented the recommendations of the 1994 *Clarksburg Master Plan and Hyattstown Special Study Area*.

### **B. Subject Property**

The subject site is described as Parcel P429 on Maryland Tax Map FV 122, and is also known as the “Butz Property” or the “Water Tank Farm Property.” The property, which consists of 54.34909 acres, is located at 21901 Ridge Road, in Germantown, Maryland, just west of Ridge Road (MD 27), north of Brink Road and east of the Brink Meadows Subdivision. It is within the “Brink Road Transition Area” of the 1994 Clarksburg Master Plan and Hyattstown Special Study Area, and is depicted below in two photographs from the Technical Staff report (Exhibit 53, p. 2):



Figure 1: Subject Site (looking North)



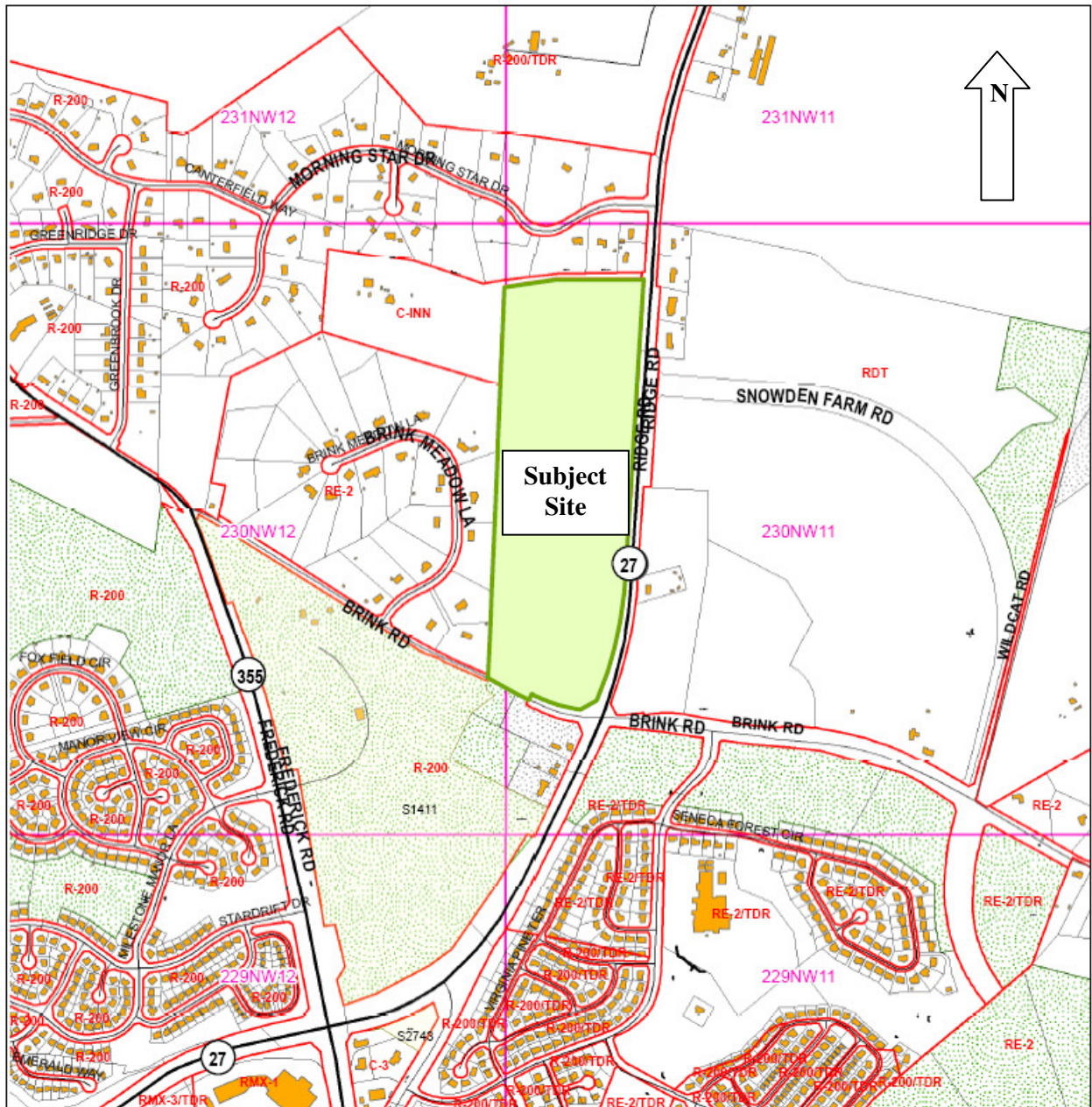
Figure 2: Subject Site (looking Northwest)

As is evident from these photographs, the property is currently being used as farmland. Technical Staff describes the property as follows (Exhibit 53, p. 2):

. . . The Property has approximately 2,860 feet of road frontage along the western side of Ridge Road, with 730 feet of frontage along the north side of Brink Road. The Property is vacant; used primarily for agricultural production. The topography consists of generally level terrain, with a minimal amount of steep slopes isolated to the man-made embankment along Ridge Road.

The Property is within the Little Seneca Creek watershed and drains to an unnamed tributary to Little Seneca Creek beginning on the adjacent property to the west and flows westward. This Property does contain a stream valley buffer that is associated with this off-site stream. In addition, the Property contains approximately 0.21 acres of forest in one stand located on the northwest corner. This forest is considered a moderate priority for retention, based on its function.

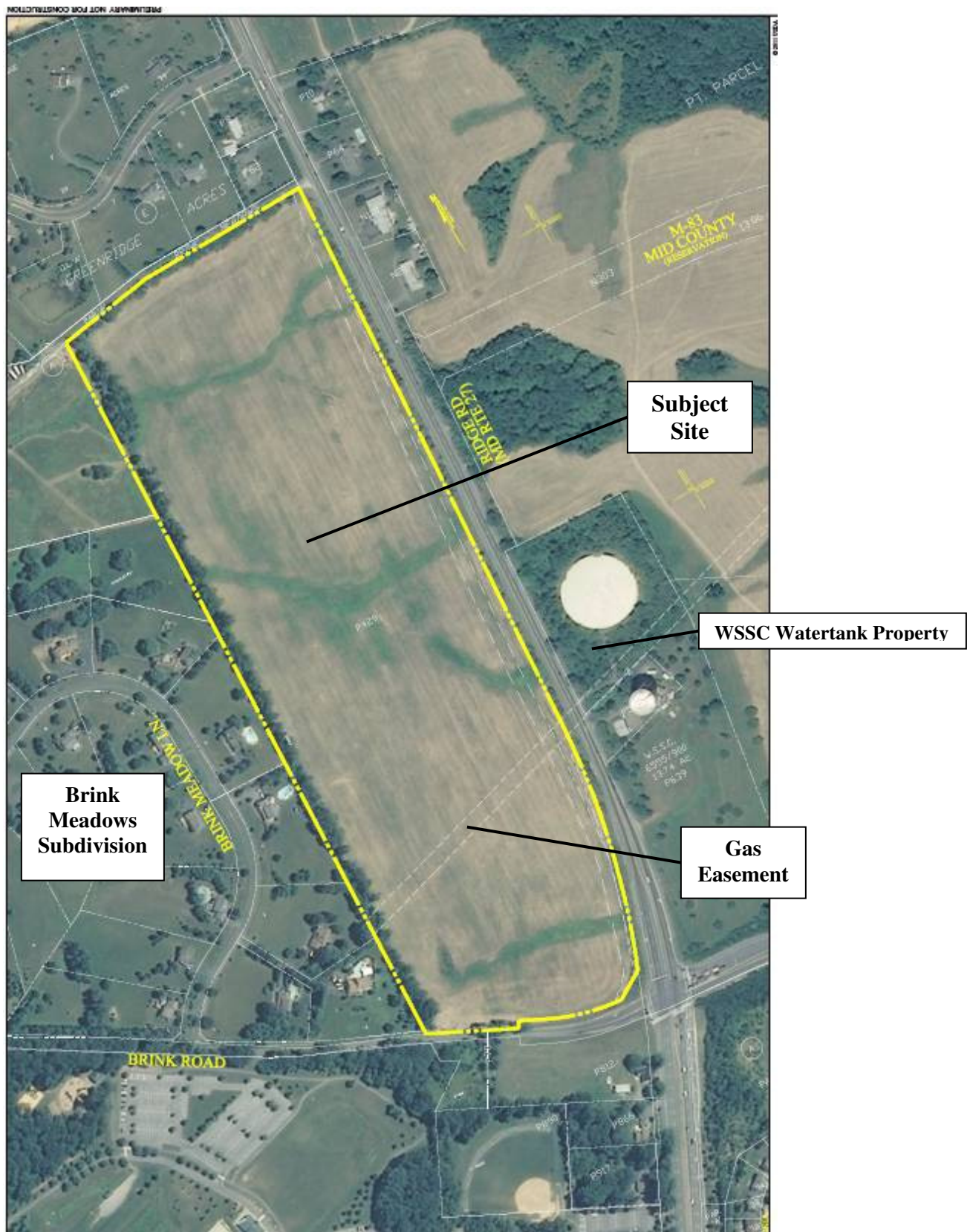
Staff also notes that the site is located within the Clarksburg Special Protection Area (SPA), and there are no streams, floodplains or wetlands on the site. Exhibit 53, p. 8. The location and shape of the property are shown on a map provided by Technical Staff as Attachment 2 to its report:



Applicants' land planner, Gary Unterberg, described the subject property as "open" and "generally rolling." 1/14 Tr. 79. The entire site, in its existing state, can be seen in the following



aerial photograph provided by Applicant (Exhibit 34(e)):



The slopes are four to five percent. There are some flat areas and some steeper areas, with a ridge line along Ridge Road. The property falls to the west from Ridge Road, which is the high point or the high line. There are several ridges and several drainage ways that traverse through the property, and there is an existing gas easement that bisects the southern portion of the property. It is the Atlantic Seaboard right-of-way for liquid gas transmission that is found running through the County. The only forest on the site is located in the upper, northwestern corner of the property. It is under half an acre, and part of that forest will be impacted by A-305, the Master Plan road that comes through the site. The site is in a special protection area, and the Planning Board, on January 16, 2013, approved the preliminary water quality plan, which is also the stormwater management concept. 1/14 Tr. 79-80.

### **C. Surrounding Area and Adjacent Development**

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. In the present case, Technical Staff did not initially designate the surrounding area boundaries. Applicants suggested the following boundaries for the surrounding area in their revised Land Use and Engineering Report (Exhibit 34(a), p. 11)):

1. To the north, the surrounding area is generally bound by Little Seneca Parkway.
2. To the east, the area is bound by Ridge Road and the planned M-83 highway to its intersection with Brink Road.
3. To the south, the area generally follows the southern boundary of Seneca Crossing Park and Seneca Crossing Drive.
4. To the west, the surrounding area follows North Fredrick Road (MD 355) to its intersection with Brink Road, then continues north along Greenbrook Drive and the western edge of the planned greenbelt buffer for Clarksburg Village.

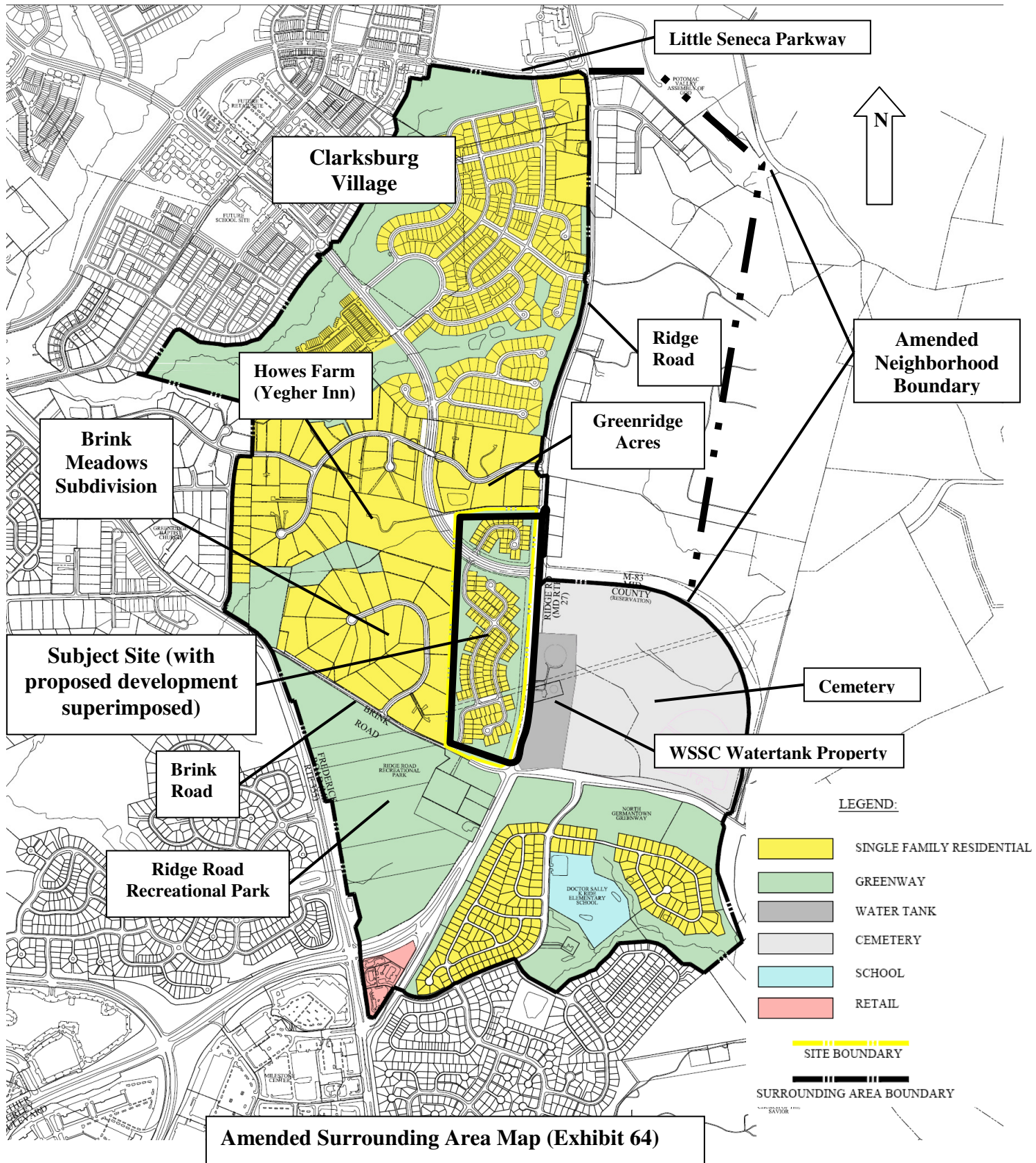
At the hearing, Mr. Unterberg offered Exhibits 34(n), an aerial photo, and 34(o), a surrounding area map, to demonstrate the surrounding area as Applicants would define it. When the Hearing Examiner asked why Applicants' proposed surrounding area excluded the area directly across Ridge Road from the site and to its northeast, Mr. Unterberg explained that that area was outside of the Clarksburg planning area. 1/14 Tr. 98.

The Hearing Examiner concludes that the surrounding area must include the area directly across Ridge Road from the site and to its northeast because the residents in those areas are likely to be directly affected by this development. That area is part of a confronting property directly across the highway from the site and also includes residential areas northeast of the site that may be affected by the development regardless of whether they are outside of the Clarksburg planning area. Therefore, an amended Surrounding Area Map was entered in the record as Exhibit 64 and an amended aerial photo of the surrounding area was entered into the record as Exhibit 65, both showing the enlarged surrounding area including locations east of Ridge Road as far north as Little Seneca Parkway. 1/14 Tr. 96-103. They are reproduced on the following pages. After the January 14 hearing, the Hearing Examiner asked Technical Staff for their opinion, and Staff responded with an e-mail (Exhibit 85) endorsing the approach taken by the Hearing Examiner.

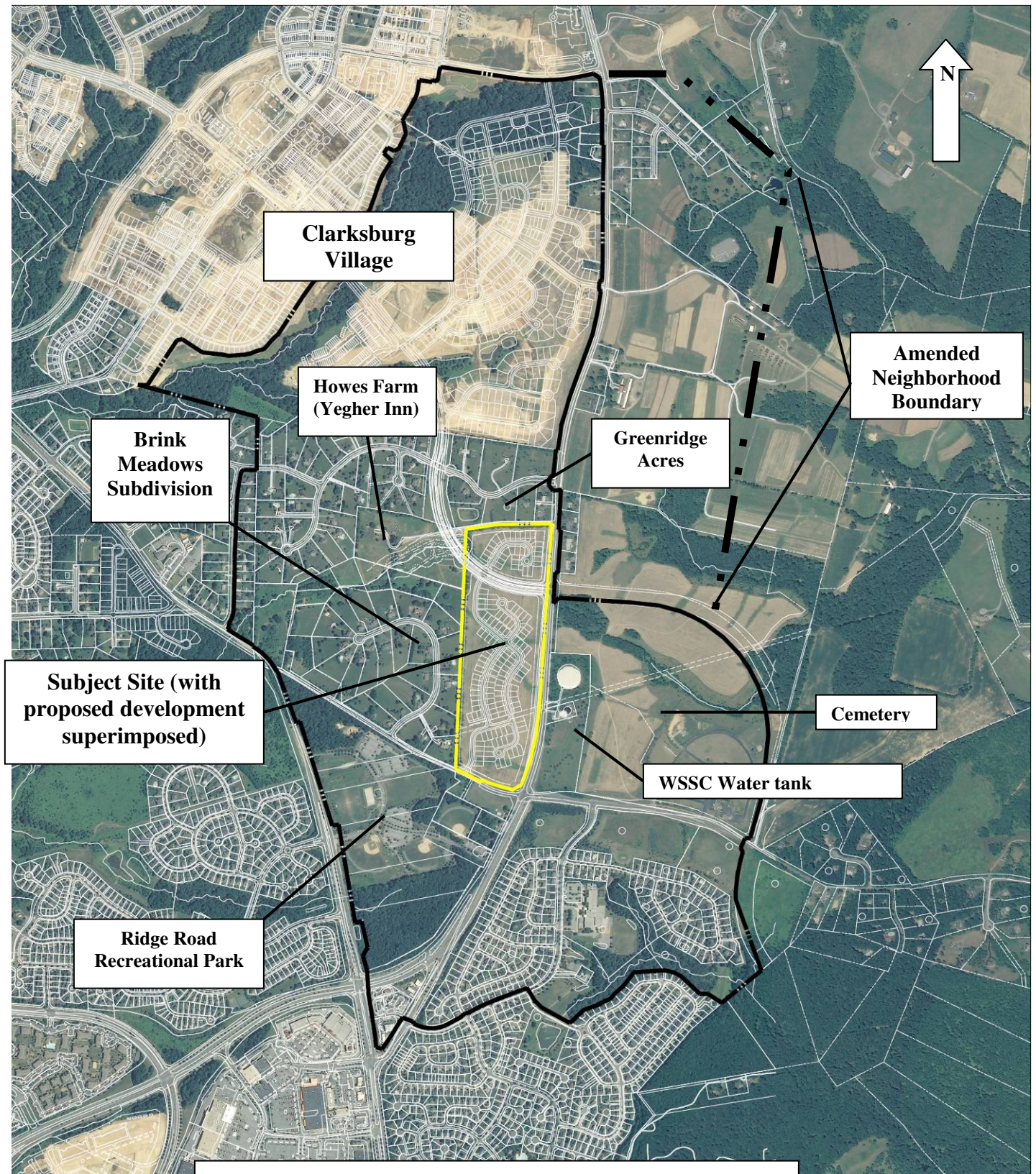
Staff described the surrounding area as follows (Exhibit 53, pp. 2):

The Property is on the easternmost edge of the Clarksburg Master Plan ("Master Plan") area. North of the Property is the residential community of Greenridge Acres, zoned R-200; however, immediately adjacent to the north and northwest of the Property is the Yegher property, zoned Country Inn. The Yegher property is also known as the Howes Farm (#13/19), an individually designated site listed in the Master Plan for Historic Preservation . . . . To the east of the Property, and across Ridge Road (MD 27) are several single-family residential dwellings, the Washington Suburban Sanitary Commission Brink Road water tower, All Souls Cemetery in the Residential Density Transfer (RDT) Zone. To the immediate west of the Property is additional one-family residences [in the Brink Meadows subdivision] zoned RE-2. South of the Property and across Brink Road is Ridge Road Recreation Park, zoned R-200 . . .









Aerial Photo of Amended Surrounding Area (Exhibit 65)



Thompson Butz, one of the Applicants, testified that the area used to be all agricultural, but that the area is now “dominated by thousands of rooftops, traffic, [and] retail . . . that are the hallmarks of a growing and evolving area.” 1/14 Tr. 18. The property directly across Ridge Road to the east has two large water towers, and is on WSSC property. The RDT zoned land across Ridge Road to the north and east of the WSSC property has been sold to the Catholic church and is now going to be used as a cemetery. The cemetery was authorized by a special exception granted on January 18, 2000, by the County Council in Resolution 14-393 (Exhibit 71). 1/14 Tr. 20-23.

Mr. Butz emphasized that his property is the last traditional row crop farming in the area. 1/14 Tr. 18. His testimony on this point was echoed by the testimony of Gary Unterberg, Applicants’ expert in land use planning, who stated that the neighborhood is primarily developed land, except for the subject site. In the Master Plan, the subject site is in Brink Road Transition Area neighborhood. Mr. Unterberg initially testified that there are residential areas to the west (Brink Meadows subdivision) and residential areas to the north (Green Ridge Acres), but the area to the east is primarily zoned RDT (Rural Density Transfer Zone). 1/14 Tr. 77-78, 98.

When questioned by the Hearing Examiner, Mr. Unterberg indicated that there are four houses directly across Ridge Road, to the east of the site. 1/14 Tr. 98. He also agreed that there are additional houses northeast of the site, along Ridge Road, just south of Little Seneca Parkway. 1/14 Tr. 101. Based on the existence of these nearby residential areas to the east, the Hearing Examiner enlarged the defined boundaries of the Surrounding Area to include territory east of Ridge Road, as discussed above and shown on the Surrounding Area map and aerial photo displayed on pages 12 and 13 of this report. Clarksburg Village is northwest of the property, as can be seen as well on the above maps. The subject site is also just southeast of the Howes Farm (Yegher Country Inn), a site listed in the Master Plan for Historic Preservation, according to Technical Staff. The Howes (Yegher) site is shown below in a photograph supplied by Staff (Exhibit 53, p. 3):



**Howes Farm (Yegher Country Inn) as Viewed from the Subject Site**

## **D. Proposed Development**

### **1. Development Concept and Applicants' Vision for the Project**

The Applicants seek to reclassify the subject site to the P-R-C Zone in order to develop their property with 140 age-restricted single-family homes (at least 85% detached), a small community center, a community garden, parking and internal roads. It will be called “The Courts at Clarksburg.” At least 12.5% of the homes (*i.e.*, 18 units) will be Moderately Priced Dwelling Units (MPDUs). The age restriction, in accordance with the P-R-C Zone’s requirements, will limit residence to those 50 years of age and older, and disabled relatives. Zoning Ordinance §59-C-7.44(a). Applicants provided an Illustrative Concept Plan (Exhibit 34(g)), which is reproduced below and on the next page:

<b>1</b>	COURTYARD CONCEPT	<b>4</b>	RESERVED GEOTHERMAL EASEMENTS, HIGH PERFORMANCE ENERGY EFFICIENT HOMES	<b>7</b>	TRAILS-CONNECTION TO ADJACENT PARK
<b>2</b>	ENVIRONMENTAL CONCEPT / ESD / SWM / BOA RESTRICTIONS ON FERTILIZER AND PESTICIDE APPLICATIONS, TO MINIMIZE NITROGEN AND PHOSPHORUS LOADING FROM COMMUNITY	<b>5</b>	CLUBHOUSE/ RECREATION ASSOCIATION WITH CLARKSBURG VILLAGE AND COMMUNITY GARDEN CLUB	<b>8</b>	TRANSIT CONNECTIONS, BUS STOP(S) AND/OR PLANNED BUS LINES/ BRT LINES ON RT. 27 AND A 305
<b>3</b>	EXPANDED BUFFER/ TREES ADJACENT TO NEIGHBORS	<b>6</b>	CLARKSBURG VILLAGE ENTRANCE FEATURE		

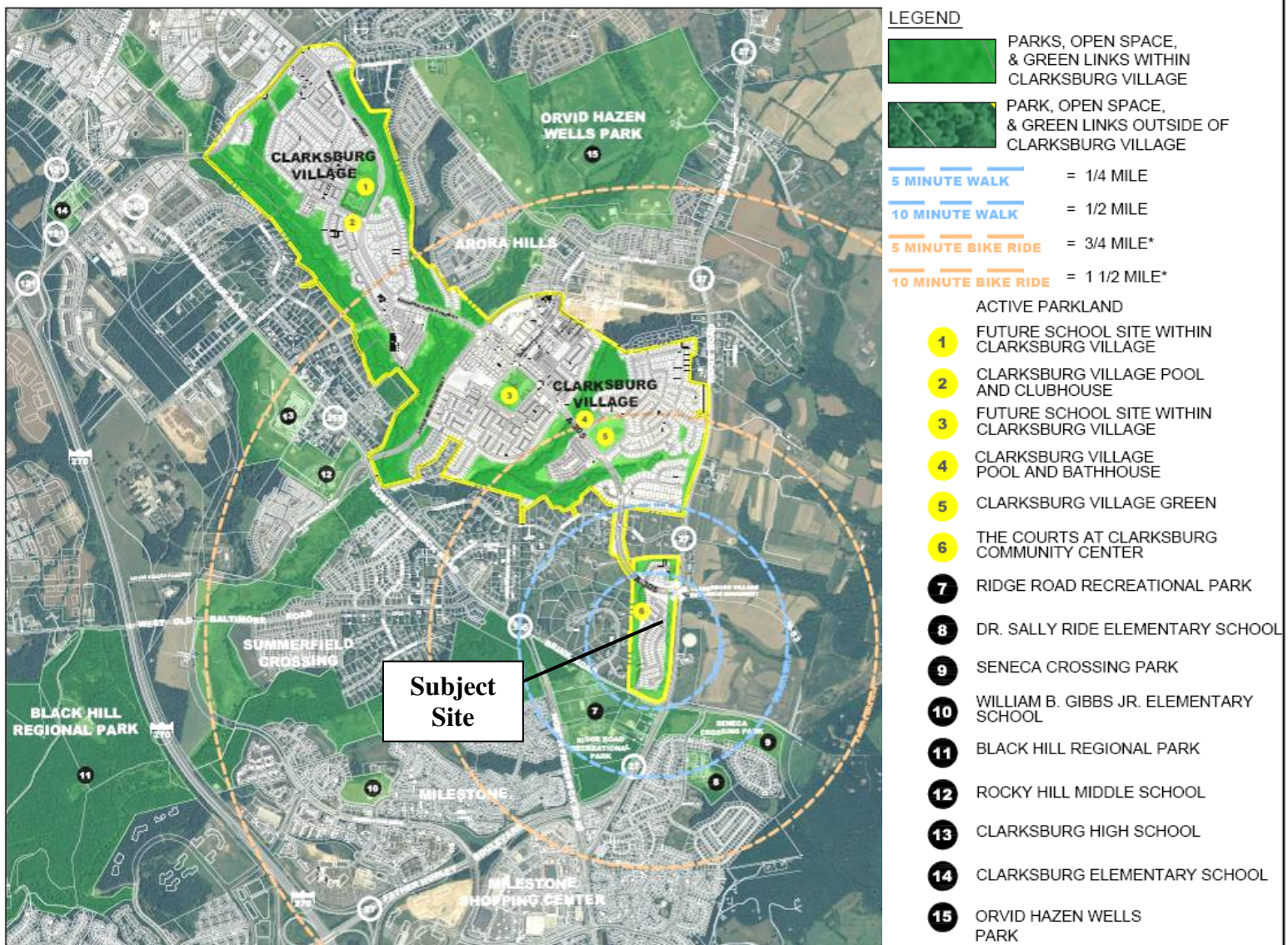




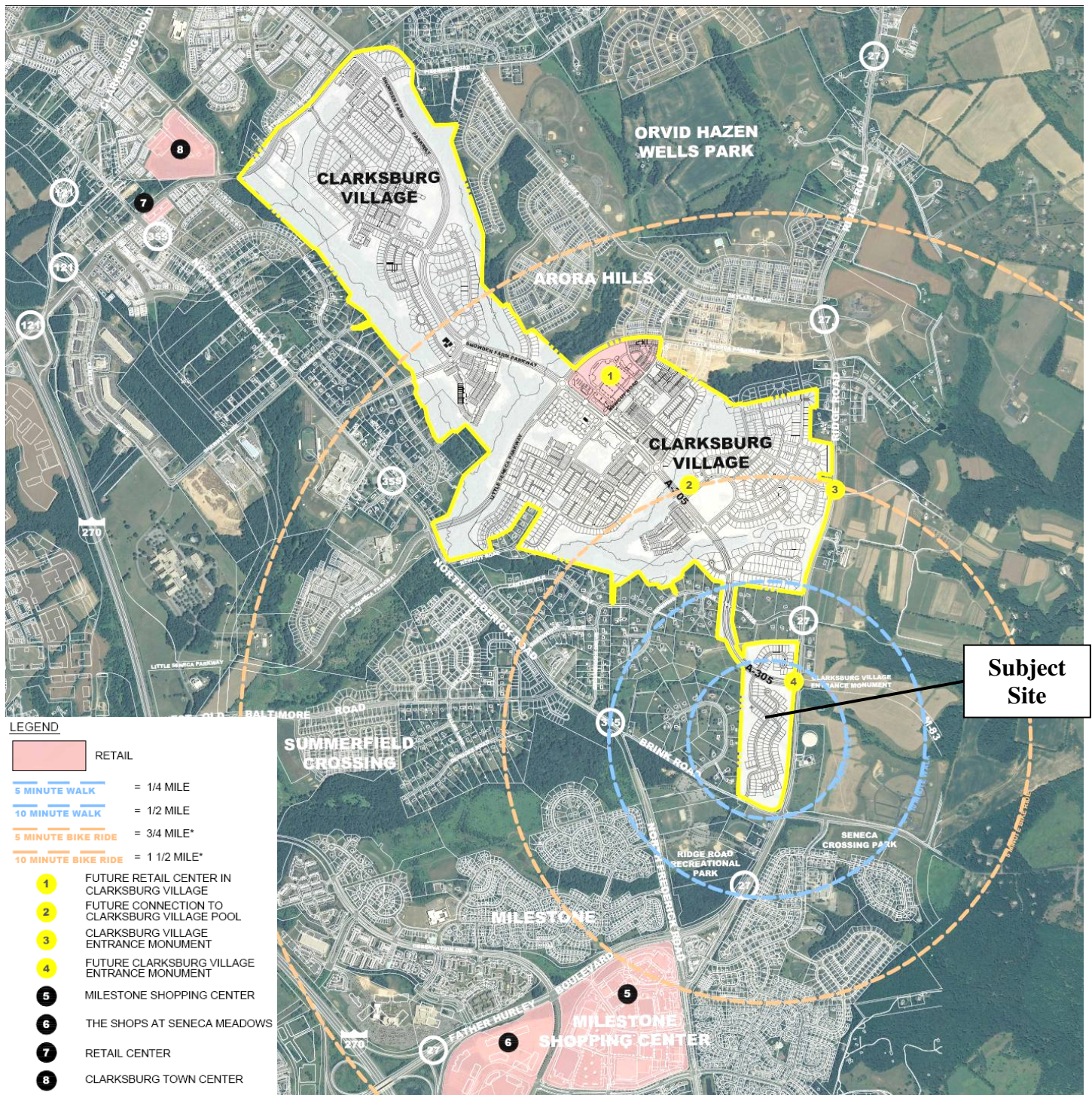


As can be seen from the above Concept Plan, Snowden Farm Road (A-305/M-83) will be extended across the property from east to west, thus creating two development areas, a large southern area (designated Area “A” on the development plan, Exhibit 94(a)), and smaller northern area (designated Area “B”). Exhibit 53, p. 4. The construction of the extended roadway will reportedly be done by Elm Street Development, the lead developer of Clarksburg Village. 1/14 Tr. 24.

Applicants’ vision is that, in addition to the amenities available on site (*i.e.*, a small community center, a pedestrian and bike system and community gardens), considerable off-site amenities and services will be easily accessible at the nearby Ridge Road Recreational Park, in Clarksburg Village and beyond (Exhibits 93(a) and (b)), as shown on the following maps (Exhibits 34(l) and (m)).







As specified on the legends of these maps, the blue concentric circles indicate walking distances and times, and the orange circles indicate biking distances and times. Mr. Butz testified that this development will be part of the “Greater Clarksburg Village,” in accordance with an agreement



with Elm Street Development (Exhibits 60 and 80(c)),<sup>6</sup> the details of which have not been worked out. That is important because it allows the residents of this community access to the amenities, trails and other aspects in Clarksburg Village. 1/14 Tr. 36.

Mr. Butz stated that the proposed development will create a lifestyle for active adults, and for them to be able to take advantage of the amenities of Clarksburg Village, the amenities within Milestone Shopping Center, and the amenities within Germantown Town Center, where there is everything from performing art centers to libraries, medical facilities, three or four grocery stores and book stores. Right across Brink Road from this property is the Ridge Road Recreational Park, which has tennis courts, ball fields and dog walks. Milestone Shopping Center is less than a mile from the subject site, and it has the Suburban Fitness Center, which offers a gym and therapeutic services. The new Wegmans is going to be at Milestone. Also located there are a Home Depot, a Wal-Mart, a Best Buy, an AT&T store and three or four restaurants. 1/14 Tr. 52-54.

Thus, the subject site is near to both major retail and recreational activities, and as stated by Mr. Butz, “tremendous transportation infrastructure.” In his opinion, two-acre, single-family homes with well and septic construction do not make sense in an area adjacent to major roads and on land that will be bisected by a four-lane arterial road (A-305). “It simply is not smart growth.” 1/14 Tr. 27-28, 40-51. Applicants therefore considered more appropriate land use options, and given the aging “baby boomer” population, and the need in the County for senior housing, the P-R-C Zone made sense to them. 1/14 Tr. 27-28.

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<sup>6</sup> In Exhibit 60, David Flanagan, the President of Clarksburg Village Investments, Inc. expresses his support for the subject application because it will fill a need for senior housing near Clarksburg Village. Mr. Flanagan notes that he would like to incorporate the development into the Clarksburg Village Homeowners Association (CVHOA) and to make the primary entrance to Clarksburg Village from MD 27 (Ridge Road) through the Butz property. In Exhibit 80(c), Kathryn Kubit, a Vice President of Elm Street Development who testified at the hearing (1/14 Tr. 251-274), reiterated Elm Street’s support for the Butz application and characterized the project as “a great addition to the Clarksburg community.” Ms. Kubit stated that Elm Street had “extended the invitation for the future residents of the Butz project to use the recreational facilities within Clarksburg Village and to join the Clarksburg Village HOA.”

Mr. Butz also referenced three studies relating to housing for seniors to support Applicants' argument that this type of senior housing is needed in the County – "55+ Housing Preference Survey," produced by the County's Department of Parks and Planning (labeled "SR-5" in Applicants' Technical Appendix (Exhibit 34(b))); "Beyond 50.05: a Report to the Nation on Livable Communities: Creating Environments for Successful Aging" produced by AARP (labeled "SR-7" in Exhibit 34(b)); and "Montgomery County's Aging Population is Growing Rapidly," a brief squib on American University's website on June 2, 2011, quoting Rollin Stanley, former director of the County's Planning Department (Exhibit 61). Mr. Butz concluded that there is substantial statistical data to support a need in this area for a planned retirement community, and there is a demand for this type of housing within the I-270 corridor.

Applicants' Technical Appendix (Exhibit 34(b)) also contains a wealth of additional materials supporting their contention that there is a need for this type of housing in the County. The listing in the Table of Contents of the Technical Appendix regarding senior housing is reproduced below:

**Senior Housing**

- SR1 Memorandum to County Council "Briefing: Shaping Our Future: Adapting to Change-Our Growing Senior Population" March 9, 2012
- SR2 "Montgomery County Snapshots: County Districts by the Numbers" May 2012
- SR3 "Housing Element of the General Plan" Montgomery County Planning Dept. April 2011
- SR4 "Housing Opportunities Commission, Strategic Plan: FY 2008-2012"
- SR5 "55+ Housing Preference Study"
- SR6 "Senior Housing Inventory and Analysis Report 2006"
- SR7 AARP "Beyond 50.05 – A Report to the Nation on Livable Communities: Creating Environments for Successful Aging"
- SR8 "The Maturing of America: Communities Moving Forward for an Aging Population" MetLife Foundation, June 2011

The Opposition attempted to challenge the proposition that there was a need for more senior housing in the County by mentioning the existence of other senior facilities (1/18 Tr. 182-185), and the Hearing Examiner invited the Opposition to submit a list of comparable senior housing in the County so that their claim could be evaluated, but they did not do so (1/18 Tr. 185). The Hearing



Examiner concludes that the overwhelming weight of the evidence establishes a need in the County for the type of senior housing being proposed by Applicants. Although a showing of County need is not a statutory criterion for this rezoning application, it certainly affects the evaluation of public interest, which is always a criterion in rezoning cases, as will be discussed later in this report.

Although forest conservation is an environmental issue, it also bears significantly in this case on the question of how Applicants plan to screen the proposed development from the adjacent neighbors, especially those to the west and the north. Applicants' plans show on-site afforestation to the north, to the west, and to the south, on the corner of Brink Road and Route 27, all of which will provide screening for the surrounding area. 1/14 Tr. 80-84. The afforestation areas, as depicted in Applicants' approved Preliminary Forest Conservation Plan (PFCP -Exhibit 41(c)), are shown on the next page, with the text details of the PFCP shown below:

FOREST CONSERVATION WORKSHEET					
The Courts at Clarksburg					
5-Aug-02					
<b>NET TRACT AREA:</b>					
A. Total tract area ...					54.35
B. Land dedication acres (parks, county facility, etc.) ...					0.00
C. Land dedication for roads or utilities (not being constructed by this plan) ...					4.95
D. Area to remain in commercial agricultural production/use ...					0.00
E. Other deductions (specify) .....				Off-site dist ( neg deduction = add'n to net ti	0.00
F. Net Tract Area .....					49.40
<b>LAND USE CATEGORY: (from <i>Trees Technical Manual</i>)</b>					
Input the number "1" under the appropriate land use, limit to only one entry.					
ARA	MDR	IDA	HDR	MPD	CIA
0	0	0	0	1	0
G. Afforestation Threshold ...				15%	x F = 7.41
H. Conservation Threshold ...				20%	x F = 9.88
<b>EXISTING FOREST COVER:</b>					
I. Existing forest cover .....					0.21
J. Area of forest above afforestation threshold .....					0.00
K. Area of forest above conservation threshold .....					0.00
<b>BREAK EVEN POINT:</b>					
L. Forest retention above threshold with no mitigation ....					0.00
M. Clearing permitted without mitigation .....					0.00
<b>PROPOSED FOREST CLEARING:</b>					
N. Total area of forest to be cleared .....					0.00
O. Total area of forest to be retained .....					0.21
<b>PLANTING REQUIREMENTS:</b>					
P. Reforestation for clearing above conservation threshold ....					0.00
Q. Reforestation for clearing below conservation threshold ....					0.00
R. Credit for retention above conservation threshold .....					0.00
S. Total reforestation required .....					0.00
T. Total afforestation required .....					7.20
U. Credit for landscaping (may not exceed 20% of "S") .....					0.00
V. Total reforestation and afforestation required .....					7.20

FOREST CONSERVATION TABLE:			
Acreage of tract (gross)	54.35 +/-		
Acreage of tract remaining in agriculture use	0.00		
Acreage of road and utility ROWs which will not be improved as part of the development application	4.95*		
Acreage of Stream Valley Buffer	0.16		
Land Use Category from 22A-12	MPD		
Conservation Threshold	15%		
Afforestation Threshold	20%		
Linear Feet of Stream Buffer	75 LF		
Average width of stream buffer	105 feet		
One side of stream of both	1		
Forest Details	Retained	Cleared	Planted
Acreage of Forest	0.21	0.00	7.20
Acreage of Forest within Wetlands	0.00	0.00	0.00
Acreage of Forest within 100-year Floodplain	0.00	0.00	0.00
Acreage of Forest within stream valley buffer	0.14	0.00	0.02
Acreage of Forest within priority area	0.14	0.00	0.02

\*Subject to change at FFCP.

**LEGEND:**

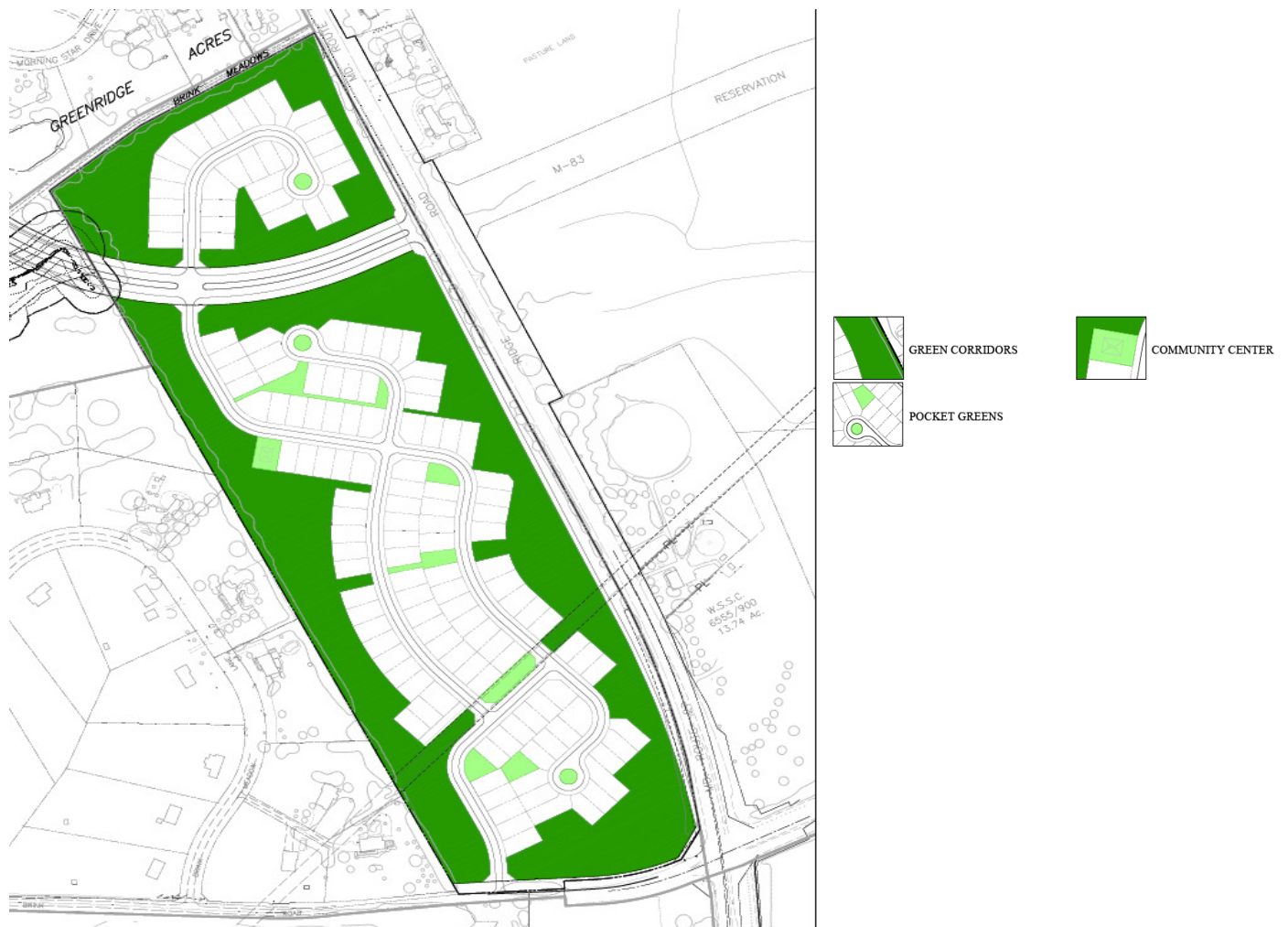
	SITE BOUNDARY
	STREAM VALLEY BUFFER
	WETLAND
	WETLAND BUFFER
	100-YEAR FLOODPLAIN
	25' FLOODPLAIN B.R.L.
	SOIL LINES
	SOIL TEXT
	EXISTING CANOPY
	EXISTING PERENNIAL OR INTERMITTENT STREAM
	EXISTING TOPOGRAPHY
	LIMITS OF DISTURBANCE
	PROPOSED CATEGORY I FOREST CONSERVATION EASEMENT
	FOREST RETENTION
	AFFORESTATION
	FOREST CLEAR (N/A)
	EX. SIGNIFICANT TREE
	NOT PART OF SUBJECT AREA*

\*This area is part of road improvement plans for A-305 and/or MD-27. A-305/MD-27 are independent of this project application. The final net tract area shall be determined at FFCEP.

**Afforestation Areas**

Dusty Rood, Applicants' expert in environmental planning, water quality and forest conservation, testified that Applicants will be adding approximately 7.2 acres of additional forest to the property, which is more than 35 times the amount of existing forest there. These areas will be protected in perpetuity through a Category One Conservation Easement, which is the most restrictive of easements that is entered into with the Planning Board. All three of these planting areas will probably be planted with a mix of evergreen and deciduous species to create a diverse forest community that will provide screening and transition to the adjacent neighborhoods. 1/18 Tr. 75-77.

In addition to the afforestation areas, Applicants plan a significant amount of green areas surrounding the planned structures and internal road systems, which will aide in screening and transition. These green area are shown below in Applicants' "Green Edge" Exhibit (Exhibit 34(j)):



Finally, in this discussion of the Applicants' vision, a few words should be said about Applicants' planned use of public sewer, rather than septic facilities envisioned in the 1994 Clarksburg Master Plan and apparently advocated by Technical Staff (Exhibit 53, p. 1, third bullet). Although this issue will be discussed further in connection with the issues of Master Plan compliance, public facilities and environmental issues, it should be noted here that Applicants consider their proposed use of the public sewer system to be much more environmentally friendly than septic systems, and indeed legally required for the subject site. 1/18 Tr. 109-117. They argue strenuously (Kline closing, 1/18 Tr. 193-194), and the Hearing Examiner believes correctly, that the Master Plan is woefully outdated on this point, as will be documented later in this report.

Technical Staff recommended denial of this application, mostly because of its interpretation of the 1994 Clarksburg Master Plan. Exhibit 53. The Planning Board disagreed, finding "that the local map amendment application substantially complies with the 1994 *Clarksburg Master Plan and Hyattstown Special Study Area*." Exhibit 54.

The issues highlighted by this disagreement between the Planning Board and its Technical Staff will be discussed below, along with the Hearing Examiner's evaluation.

## **2. Development Plan & Binding Elements in LMA G-881**

Pursuant to Code § 59-D-1.1, development in the P-R-C Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the P-R-C Zone. Under Code §59-D-1.3, this development plan must contain several elements:

- (a) A natural resources inventory;
- (b) A surrounding area map, showing the relationship to the site and use of the adjacent land;
- (c) A land use plan showing site access; locations and uses of all buildings and structures; a preliminary classification of dwelling units; locations of parking areas, including number of parking spaces; location of land to be dedicated to public use; location of land intended for common or quasi-public use but not intended to be in public ownership; and a preliminary forest conservation plan;
- (d) A development program stating the sequence of proposed development;
- (e) The relationship, if any, to the County's capital improvements program;

- (f), (g) & (h) . . . [Inapplicable to the P-R-C Zone]; and  
 (i) Water Quality Plans and required approvals

The Development Plan and the Land Use Element that constitutes one of its primary parts are binding on the Applicants except where particular elements are identified as illustrative or conceptual. Illustrative elements may be changed during site plan review by the Planning Board, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment.

The revised land use plan for the present zoning application, Exhibit 94(a), is titled “Development Plan - Land Use Element” and will be referred to by either name in this report. A copy of the Development Plan (Exhibit 94(a)) is reproduced below and on the following pages. To make its details more visible, the site layout diagram is shown separately. The textual elements are printed on the development plan, and they are as follows:

**DEVELOPMENT PLAN NOTES:  
 BINDING ELEMENTS:**

1. The development plan depicts the overall concept for the orderly and staged development of The Courts at Clarksburg; a planned retirement community made up of interdependent phases. This development plan depicts that element of the Planned Retirement Community that is to be developed in accordance with provisions of the Zoning Ordinance applicable to the PRC Zone. It is anticipated that revisions to the development plan may become necessary as the entire Community evolves. This development plan reflects the proposed Community as it is presently envisioned.
2. Densities, use, and mix of housing types are as specified in the appropriate tables for A and B. Building and parking locations will be approximately as shown. Specific building locations, footprints, parking locations and other design details will be refined and finalized during subsequent subdivision and site plan proceedings.
3. Impervious Area to be up to 28% based on a net acreage of 49.4 AC.
- 4.

<div style="display: flex; align-items: center;"> <div style="font-size: 48pt; margin-right: 10px;">A</div> <div> <b>Predominantly Detached Residential w/            Attached Residential            Up To 35 feet in Height            Approximately 38.9± Acres</b> </div> </div>		
<b>Residential</b>	<b># Units</b>	<b>Parking Spaces</b>
Detached/ Attached*	100 - 130	200 - 260
<b>Other</b>	<b>#</b>	<b>Parking Spaces</b>
Community Center	1	TBD

<b>B</b> Predominantly Detached Residential w/ Attached Residential Up To 35 feet in Height Approximately 10.5± Acres		
Residential	# Units	Parking Spaces
Detached/ Attached*	25 - 35	50 - 70

PRC Yield Summary		
Residential		
Detached	Minimum 85%	119 Units
Attached*	Not to Exceed 15%	21 Units
Total	Not to Exceed	140 Units
Other		
Community Center	Size to be determined at Preliminary Plan	
Binding Element for Age Restriction: Residency is restricted to permanent residents 50 years of age or over except: (a) a disabled relative may reside with a permanent resident; and (b) any person eligible for residency as described in Section 59-C-7.44 ("Age of residents, residential densities and MPDU"), or its successor, after the date of approval of this development plan.		

\*\*Attached" Residential describes a dwelling unit commonly referred to in the age restricted housing industry as a "villa". An attached residential unit (villa) will be a two story structure containing a first floor master bedroom.

## NON-BINDING (ILLUSTRATIVE) ELEMENTS:

- Rights of way for the following Master Plan roads to be dedicated:  
A-305 Midcounty Highway  
M-27 Ridge Road (MD 27)
- Public Roads are Tertiary per MCDOT Standards. (20' Curb & Gutter With Sidewalk on One Side)
- Off-street parking shall be provided in accordance with the requirements of article 59-E
- Parking for Detached and Semidetached will be provided with two parking spaces per unit on the lot as required per Sec. 59-E-3.7
- The property, including the open space, will be subject to site plan review. Final number of lots, and lot areas subject to change at preliminary plan, site plan, and/or record plat.
- The site consists of parcel P429 (54.349+/- Acres)
- Net Tract Area: 49.4± ac.
- Dedication: 4.9± ac. Snowden Farm Pkwy. (A-305), Brink Rd., and Ridge Rd. (MD 27)
- The site is found on tax maps FV122, and EV562.
- The current zoning for the subject property is RE-2 (P429).
- The proposed zoning is PRC, Planned Retirement Community.
- The boundary information shown is based on a boundary survey prepared by Rodgers Consulting, Inc., February 2009.
- Horizontal datum is the Maryland Coordinate System NAD83/91.
- The site is located within the Clarksburg Special Protection Area, and is subject to water quality plan and review.
- The site has an NRI/FSD approved by M-NCP&PC, May 3, 2012, NRI/FSD No.420121380. Expires May 3, 2014.
- The topography hereon is shown at 2' contour intervals and was flown by McKenzie-Snyder in April 2008.
- Forest Conservation Mitigation will be provided Per Chapter 22A.
- The site utilities will be served by Potomac Edison, Verizon, Comcast, Washington Gas, and various utilities.
- The proposed road improvements for MD Route 27 & A-305 (Pavement, Sidewalk, Bike Path, etc.) are by others and subject to change per final engineering.
- Number of bedrooms range from 1 to 3 bedrooms per unit. The average number of bedrooms per unit is 2.5

**21. APPLICABLE DEVELOPMENT STANDARDS SEC. 59-C-7.4:**

- a. Minimum Tract Area (Sec.59-C-7.43):  
 Required: 25 Acres Minimum  
 Proposed: 54.349 ± Acres
- b. Age of Residents, residential densities, and MPDU (Sec. 59-C-7.44):  
 Age Restriction  
 Required/Proposed: 50 years of age or over  
 Density  
 Required: Up to 10 Dwelling Units, per acre/543 DU maximum  
 Proposed: Gross 2.6 Dwelling Units, per acre
- c. Perimeter Setbacks (Sec. 59-C-7.45)  
 Required/Proposed: Not less than the setback of the adjacent zone.  
 RE-2: Rear Yard, Street: 35', 50'  
 C-INN - From Boundary: 75'  
 R-200 - Rear Yard, Street: 30', 40'  
 RDT - Street: 50'  
 NOTE: Additional Setback required when building height exceeds 35'.
- d. Green Area (Sec. 59-C-7.462)  
 Required/Proposed: 50%
- e. Height of Buildings (Sec. 59-C-7.47)  
 Required/Proposed: 35'
- f. Off-streetParking (Sec. 59-C-7.481)  
 Residential  
 Required: 2 spaces, per DU = Up to 280 spaces  
 Community Center  
 Required: 2.5 spaces, per 1,000 sf.  
 spaces to be determined at preliminary plan
- g. Private Roads (Sec. 59-C-7.482)  
 Required/Proposed: 22' Min. Pavement Private Road (Two-Way)  
 12' Min. Pavement Private Road (One-Way)

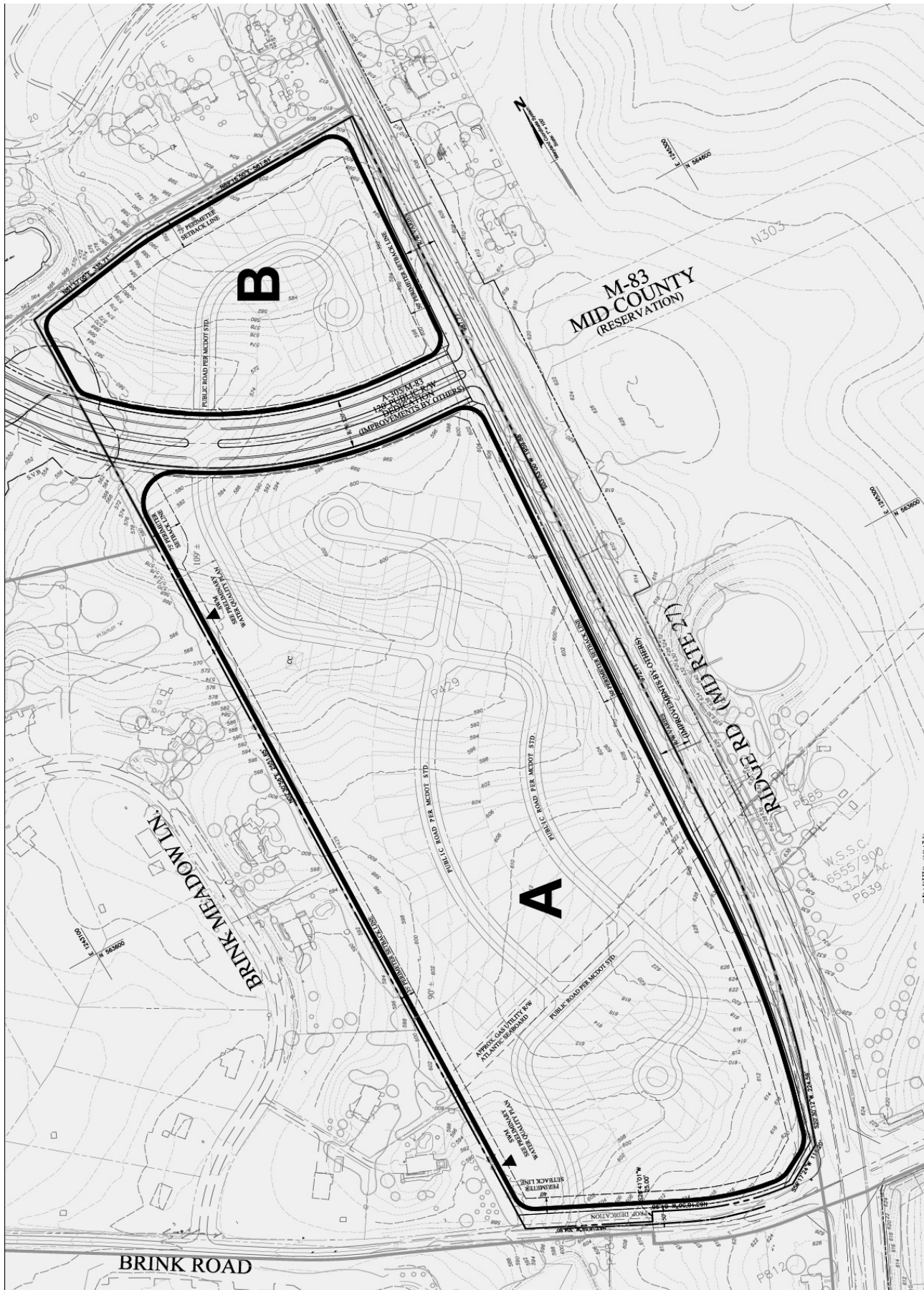
**21. WAIVERS REQUIRED:**

- a. A waiver for closed section streets within a Special Protection Area (SPA) is required at preliminary plan of subdivision.
- b. A waiver for cul-de-sacs over 500' in length is required at preliminary plan of subdivision.
- c. A waiver for sidewalk on one side of the street is required at preliminary plan of subdivision.



Applicant will plant screening trees in the area adjacent to the proposed extended detention (dry) ponds shown on Exhibit 34-S to the extent that governmental agencies allow reduction in the size of SWM facilities as determined by final agency design approval. If no space for additional planting is created on the subject property by the final agency design approval, screening trees will be installed on Lot 2, Lot 12 and Outlot A along the common boundary line with the subject property, in accordance with a letter of agreement between the Applicant and the owners of said lots.







The key aspects of the proposal are that the site will be developed with up to 140 age-restricted single-family homes;<sup>7</sup> that at least 85% of these homes will be detached; that at least 12.5% of the homes (*i.e.*, 18 units) will be MPDUs; that building heights will not exceed 35 feet; that the impervious area will not exceed 28%; that residents will be limited to those 50 years of age and older and disabled relatives, in accordance with the P-R-C Zone's requirements; that a community center will be constructed; that sufficient on-site parking will be provided; and that approximately 4.9 acres of land will be dedicated along Snowden Farm Parkway (A-305), Brink Road and Ridge Road (MD 27). The proposed development will be called "The Courts at Clarksburg" and will be subject to preliminary plan and site plan approval by the Planning Board.

The above Development Plan reflects four changes that were made to it as a result of the hearing:

1. The potential percentage of attached units was reduced from 20% to 15%;
2. The following Binding Element was added to address a concern of the neighbors:<sup>8</sup>

Binding Element for Age Restriction:

Residency is restricted to permanent residents 50 years of age or over except: (a) a disabled relative may reside with a permanent resident; and (b) any person eligible for residency as described in Section 59-C-7.44 ("Age of residents, residential densities and MPDU"), or its successor, after the date of approval of this development plan.

3. A description of "Attached" units was added, as follows:

"Attached" Residential describes a dwelling unit commonly referred to in the age restricted housing industry as a "villa". An attached residential unit (villa) will be a two story structure containing a first floor master bedroom.

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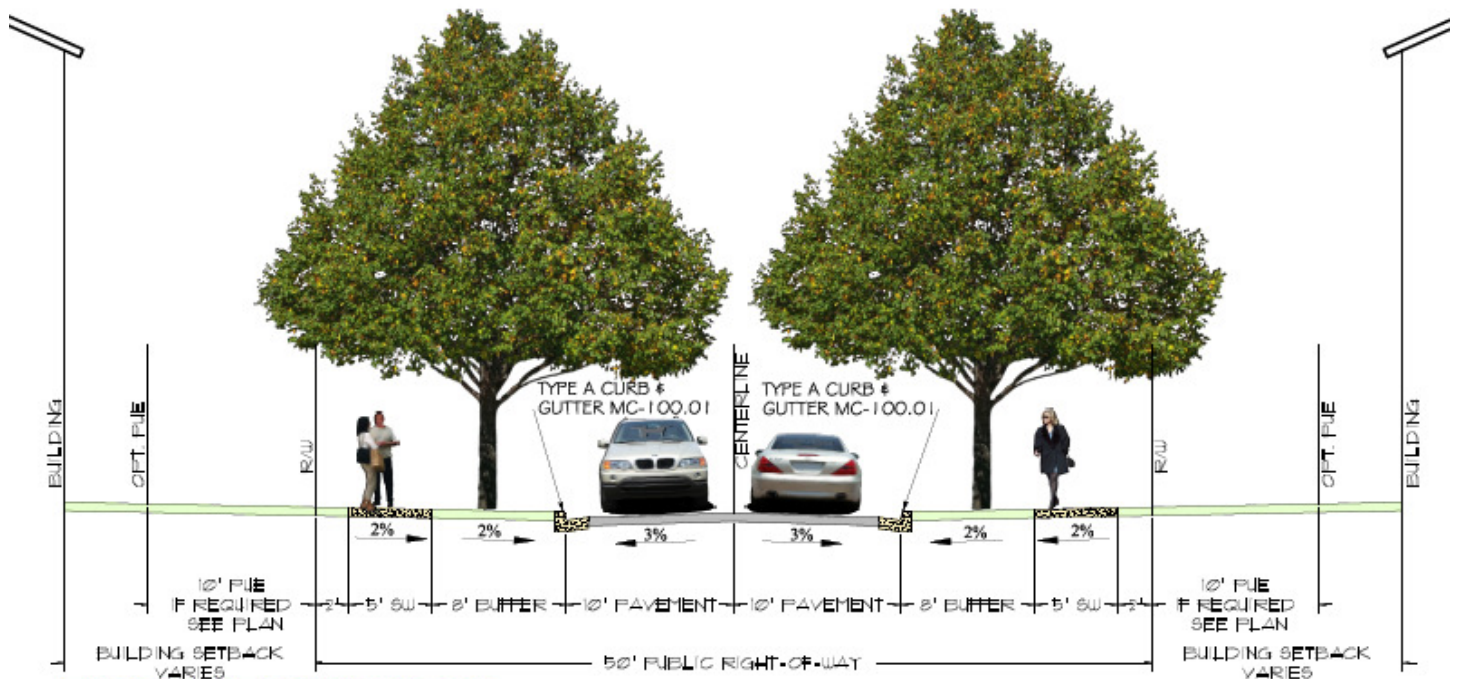
<sup>7</sup> The original development plan (Exhibit 8), filed in 2009, called for 221 dwelling units.

<sup>8</sup> When Applicants added this Age Restriction Binding Element, they moved a note regarding the proposed number of bedrooms per unit from the Binding Element Box to the list of non-binding elements, labeling the new element as number 20 ("20. Number of bedrooms range from 1 to 3 bedrooms per unit. The average number of bedrooms per unit is 2.5."). When they did so, that required them to relabel the next element ("Applicable Development Standards") as number 21. Unfortunately, Applicants neglected to relabel the item after that ("Waivers Requested") to number 22. The Development Plan therefore has two items labeled number 21. The Hearing Examiner concluded that this error was too minor to require a corrected filing.

4. A note was added to ameliorate a concern of the adjacent neighbors to the west about the adequacy of screening next to the “dry pond” stormwater management facilities planned for the site:

Applicant will plant screening trees in the area adjacent to the proposed extended detention (dry) ponds shown on Exhibit 34-S to the extent that governmental agencies allow reduction in the size of SWM facilities as determined by final agency design approval. If no space for additional planting is created on the subject property by the final agency design approval, screening trees will be installed on Lot 2, Lot 12 and Outlot A along the common boundary line with the subject property, in accordance with a letter of agreement between the Applicant and the owners of said lots.

Finally, Applicants produced a plan which demonstrates the proposed walkways, bikeways and internal streets (Exhibit 34(k)). It is reproduced below and on the next page:



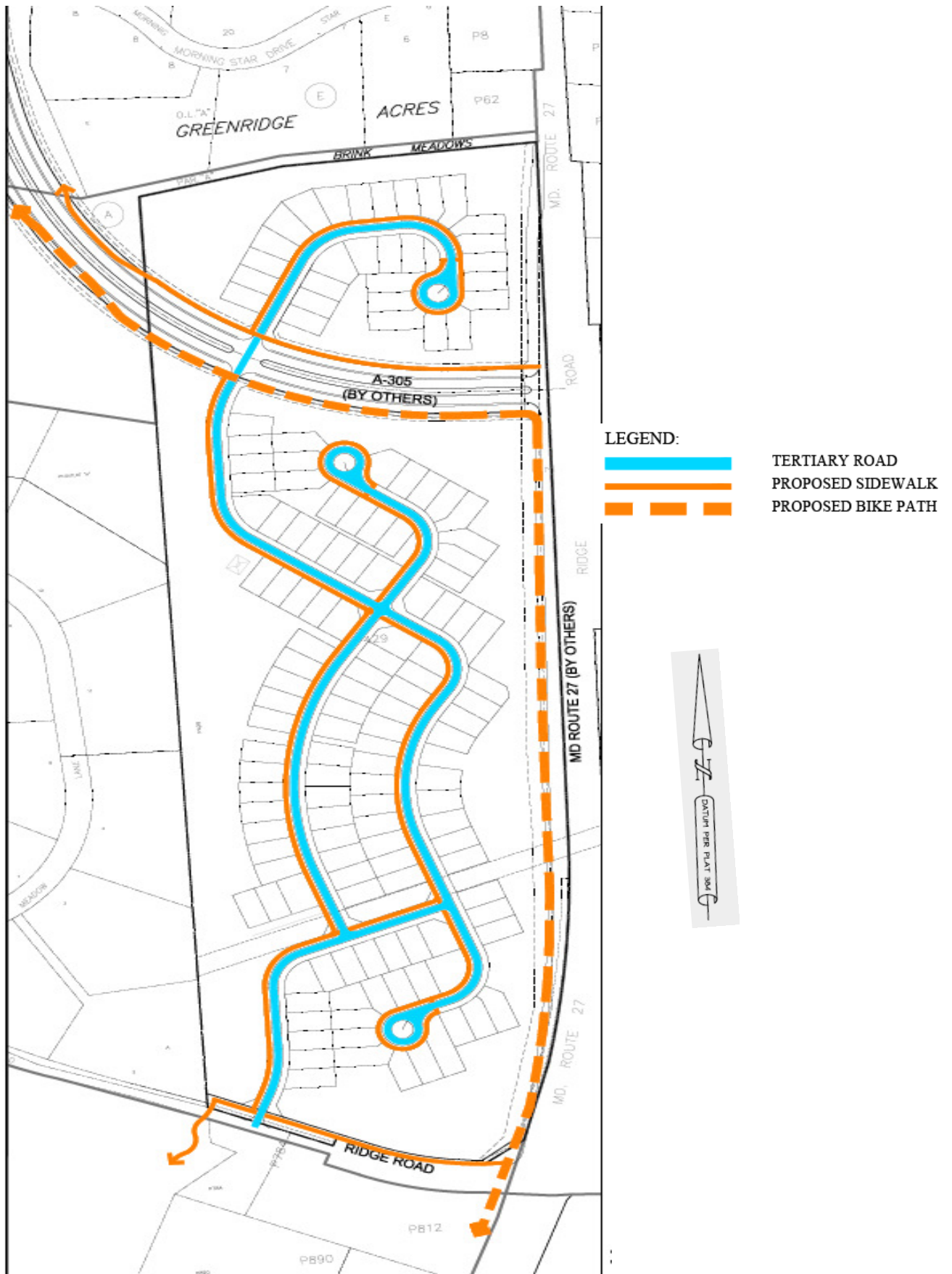
## TYPICAL TERTIARY ROAD

Standard No. 2001.02

RESIDENTIAL STREET- SIDEWALK ON BOTH SIDES\*

NTS

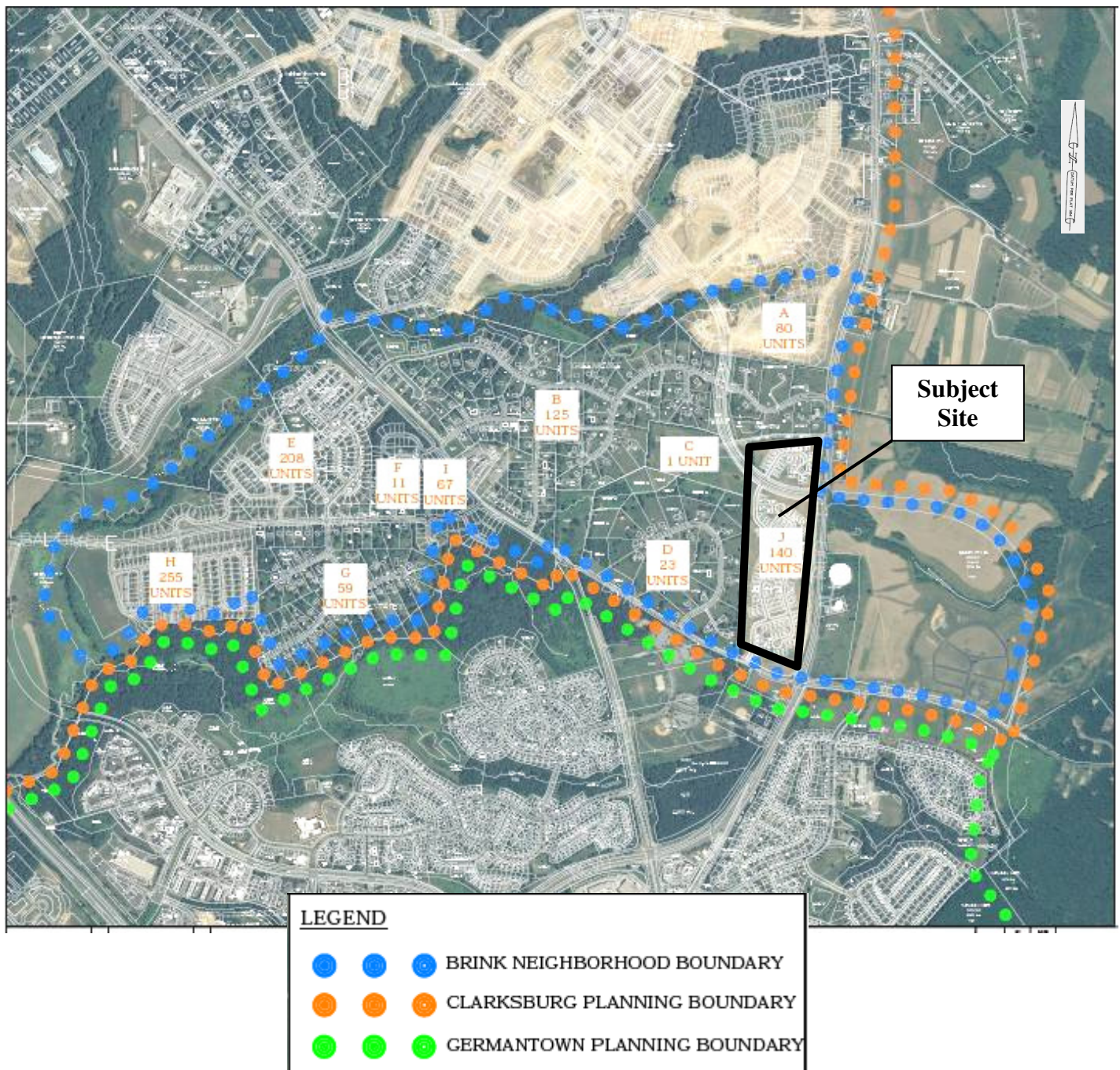
\*DETAIL AS SHOWN IS AN EARLY STUDY. PROPOSED IS SIDEWALK ON ONE SIDE SUBJECT TO WAIVER APPROVAL.





### 3. Conformance with the Master Plan

The subject site is located within the 860 acre Brink Road Transition Area of the Clarksburg Master Plan and Hyattstown Special Study Area, approved and adopted in 1994. A map delineating that area, as well as the planning boundaries of Clarksburg and Germantown, is shown below (Exhibit 34(q)). The map also indicates the number of dwelling units existing and planned in the area:



The Brink Road Transition Area is discussed on pages 39 to 41, 75 to 77 and 97 of the Clarksburg Master Plan. Page 40 of the Master Plan recommends a maximum of 1,000 dwelling units in the Brink Road Transition Area neighborhood. Applicants' land planner, Gary Unterberg, testified that the neighborhood is primarily developed already, except for the subject site. Mr. Unterberg noted that adding the 140 proposed units for the site to the existing homes in the Brink Road neighborhood would bring the total to 969 units, which is less than the 1,000 unit cap recommended on page 40 of the Master Plan. 1/14 Tr. 77-79. This calculation is reflected in a chart on Exhibit 34(q), which is reproduced below:

<b>CALCULATIONS: (UNITS WITHIN THE BRINK ROAD NEIGHBORHOOD)</b>	
A KINGSTEAD MANOR-	<b>80 Units ±</b>
B GREENRIDGE ACRES-	<b>125 Units ±</b>
C COUNTRY INN-	1 Unit
D BRINK MEADOW-	<b>23 Units ±</b>
E CLARKSBURG HEIGHTS-	<b>208 Units ±</b>
F MUSGROVE-	<b>11 Units ±</b>
G BEAU MONDE ESTATES-	<b>59 Units ±</b>
<b>H SUMMERFIELD CROSSING-</b>	<b>255 Units ±</b>
I TAPESTRY (FUTURE)-	67 Units
J THE COURTS (FUTURE)-	140 Units
<b>TOTAL-</b>	<b>969 Units ±</b>
Maximum Dwelling Units Per Master Plan Page #40	1,000 Units

The central issue in this case is whether the proposed development is consistent with the goals of the 1994 Clarksburg Master Plan, as urged by the Applicants and determined by the Planning Board (Exhibit 54), or inconsistent with the Master Plan, as determined by Technical Staff (Exhibit 53).

Technical Staff summarized its conclusions on page 1 of its report (Exhibit 53):

- The project does not substantially comply with the density provisions for the specific site in the Master Plan (pages 77 and 97).
- The project does not provide adequate transition in density between the adjacent properties designated in the Master Plan (pages 75 - 77, and 97).

- The project requires public sewer and water that is not recommended in the Master Plan (pages 202 and 215).
- The project does not meet the purpose of the PRC Zone.

Technical Staff's rationale was set forth on pages 5-6 of its report (Exhibit 53), quoted here in its entirety:

### **Master Plan**

This Property is located within the 1994 *Clarksburg Master Plan and Hyattstown Special Study Area* and is specifically identified within the "Brink Road Transition Area." The Master Plan designates the subject property as Rural Residential and for a density of 1 unit per 5 acres (0.2 units per acre) to 1.0 unit per acre (page 77) and figure 29). Although the Master Plan also designates a portion of the Brink Road transition Area for 2 - 4 units per acre (pages 75 and 77), the subject property is specifically designated for 1 dwelling unit per 5 acres (0.2 units per acres to 1 dwelling unit per acre (pages 77 and figure 29). In addition, the Zoning Plan in the Master Plan proposes this Property in the RE-2 Zone (pages 97 and Figure 38).

The Master Plan objectives for the Brink Road Transition Area (pages 75-76, *Clarksburg Master Plan*) include the following:

- 1) Create a transition from Germantown to Clarksburg that helps reinforce each community's identity;
- 2) Recommend low intensity, light industrial employment uses near I-270;
- 3) Continue the residential character of MD 355;
- 4) Reinforce the North Germantown greenbelt concept; and
- 5) Designate Midcounty Highway as an appropriate edge to the Agricultural Reserve area east of Ridge Road.

Discussion in the Master Plan recognizes the Germantown greenbelt as a transition and visual buffer between Germantown and Clarksburg and recommends that low density, rural residential development be used to create the transition between the two planning areas. The Master Plan suggests that this density will allow single-family units and be supportive of the existing residential land use pattern along MD 355 (see Attachment 8). The land use plan shows the Property and surrounding parcels as having a rural residential designation between 1 dwelling unit per acre to 1 dwelling unit per 5 acres (see Attachment 9).

Other Master Plan objectives for the Brink Road transition do not apply; however, Objective 5 (above) resulted in a rezoning from the RDT Zone to the RC Zone, for the property across Ridge Road, including the Brink Road water tower and the All Souls Cemetery.

Key land use recommendations include creating a suitable transition from other communities, such as Damascus, Germantown to Clarksburg, and that in order to implement this vision, to recommend residential zones that will facilitate the provision of detached units, and large lot zoning as transition to neighboring rural and agricultural areas.

Development staging mechanisms are established within the Master Plan, and relate to the provision of public water and sewer. The Subject Property was not programmed for sewer or water extensions. As such, the Property was not staged for development and was otherwise able to proceed with development using private wells and septic systems.

The Master Plan provides guidance with regards to floating zone approvals. The Master Plan states that “in order for proposed rezoning to take place, the County Council must find that the proposed rezoning for these parcels be compatible with surrounding uses and in accord with the expressed purposes and requirements of the zone.” It further recommends that reclassifications to a floating zone in areas designated in the *staged service areas* not be approved until the triggers for the stage within which the floating zone is located, have been met. This Property was not considered for a floating zone; however, for purposes of the PRC Zone, the Master Plan does not need to specifically recommend for this zone to be applied.

Applicants rebutted Technical Staff’s rationale and conclusions with a number of witnesses, including Gary Unterberg, a land planner; Jennifer Russel, an expert in master planning, with extensive experience in the Clarksburg area; and Frank Bossong, a civil engineer. The thrust of Applicants’ argument is that the Master Plan is ambiguous on the density recommendation, stating in one place that a density of “two to four units per acre” is desirable for the Brink Road Transition Area (Plan p. 75), while indicating in maps in two other locations (Plan pp. 77 and 97) that density should be limited to between 0.2 units per acre and one dwelling unit per acre. Applicants argue that the lower density recommendation is premised on the incorrect assumption that public sewage would not be available to this site.

Mr. Unterberg opined that the design of the project will complement the Germantown Greenway and will serve as a gateway to Clarksburg as one travels north on Route 27, in accordance with the Master Plan’s objectives. He noted the two acres of planned reforestation and the green edge that would be created, as demonstrated in Site sections -Exhibits 40(a) and (b). Mr. Unterberg

emphasized his earlier testimony that the project would be consistent with the Master Plan's 1,000 unit cap in the Brink Road Transitional Area (p. 40 of the Master Plan) and its residential density recommendation of two to four units per acre (p. 75 of the Master Plan). Building 140 residential units on the 54 acres would result in a density of just under 2.6 units per acre. 1/14 Tr. 136-139.

Jennifer Russel quoted from p. 75 of the Master Plan, which discusses the Brink Road Transition Area, "To further reinforce the transition from Germantown . . . to Clarksburg . . . , this Plan proposes the entry to Clarksburg be characterized by low density residential development (two to four units per acre)." [Emphasis added.] She stated that the subject property is clearly the entry point to Clarksburg, as it transitions from neighboring Germantown.

Ms. Russel recognized that the land use plan on page 77 of the Master Plan is in conflict with the language quoted above because it designates the property in a much lower density range – rural residential (a range of one d.u. per acre to one d.u. per five acres), and page 97 of the Master Plan has a Zoning Plan that shows the property as RE-2 (*i.e.*, 0.5 d.u. per acre). Ms. Russel opined that because this parcel is at the entry to Clarksburg, the text language that recommends low density residential, at two to four units per acre, should prevail. 1/14 Tr. 208. She noted that on page 75, in the first paragraph, it alludes to the fact that there's an absence of sewer in this general area. It is Ms. Russel's opinion that the mistaken understanding in 1994 that the site could not be sewerred, held the parcel captive to the lower density. 1/14 Tr. 209.

Ms. Russel further testified that the Brink Road Transition Area, as shown in Exhibit 34(q) and as described on page 75 of the Plan, "forms a visual buffer between Germantown and Clarksburg . . ." She feels that Applicants' development plan subtly shifts density to the north and creates a very robust green belt and an entryway into the Clarksburg planning area, which is demarked by Route 27. In fact, the monumental entrance for Clarksburg Village is going to be situated at the intersection of Route 27 and A-305, which is the eastern edge of the subject site. 1/14 Tr. 210-211. This point was



buttressed by the testimony of Katherine Kubit, Vice President of Elm Street Development, the developer of Clarksburg Village. She agreed that the primary entrance to Clarksburg Village will be through the Butz Farm, along the future Snowden Farm Parkway (i.e., A-305). 1/14 Tr. 265.

Ms. Russel confirmed that the proposed project will not violate the Master Plan's density cap on end-state development for the Brink Road Transition Area (page 40 of the Master Plan) because with the addition of the 140 units for Applicants' Courts at Clarksburg, the planning area still only incorporates 969 units, well below the stated cap of 1,000. She stated that the Brink Road area is very much built out already, so under the Master Plan, after this development, it is unlikely to have any more dwelling units in this area. 1/14 Tr. 216-217.

Ms. Russel pointed out that at the time of the Master Plan's adoption, which was 18 years ago, the property was not and could not have been considered for the P-R-C zone because the zone at the time was applicable only to parcels of 750 acres or more. She added that Applicants are trying to provide non-vertical, age-restricted housing of a single-family nature in the up-county area, where there is nothing of that sort. Moreover, this is in a County where the demographic data shows an increasing number of residents entering the 50-and-older age group. She concluded that those are the kinds of current public policy needs that simply could not have been addressed or reflected in a recommendation of the 18-year-old Master Plan. 1/14 Tr. 218-220.

The current requirement for public sewer in this area will be discussed later in this report in connection with the adequacy of public facilities. Suffice it to say at this point that Applicants have amply proven their point about the availability (and indeed current requirement) of public sewer connections in the area, and the Master Plan makes clear that the lack of public sewer was a driving force for its density recommendations. As stated on page 75 of the Master Plan, "The absence of sewer has resulted in most of the existing subdivisions being built on well and septic, so average lot sizes range from one to two acres."

Technical Staff recognized this reason for the 1994 Master Plan's recommendations, stating, "The Subject Property was not programmed for sewer or water extensions. As such, the Property was not staged for development and was otherwise able to proceed with development using private wells and septic systems." Exhibit 53, p. 6. Yet, Staff apparently did not find the subsequent changes in the public sewer situation to be sufficient to overcome its adherence to the lower density recommendations in the Master Plan.

The Planning Board, in rejecting Technical Staff's interpretation of the Master Plan, stated (Exhibit 54):

The Planning Board further concluded that the local map amendment application substantially complies with the 1994 *Clarksburg Master Plan and Hyattstown Special Study Area*. The Planning Board believes that proposed rezoning and associated Development Plan meet the overall goals and density of the Brink Road Transition Area and provide an appropriate transition from the Germantown Master Plan Planning Area to the Clarksburg Master Plan Area.

The Board weighed these elements against the density recommendation on the master plan zoning map and considered them more persuasive and a stronger indicator of the master plan's objectives. The Development Plan provides a low density transition which, coupled with the forest buffers and setbacks, provides compatibility with the surrounding community.

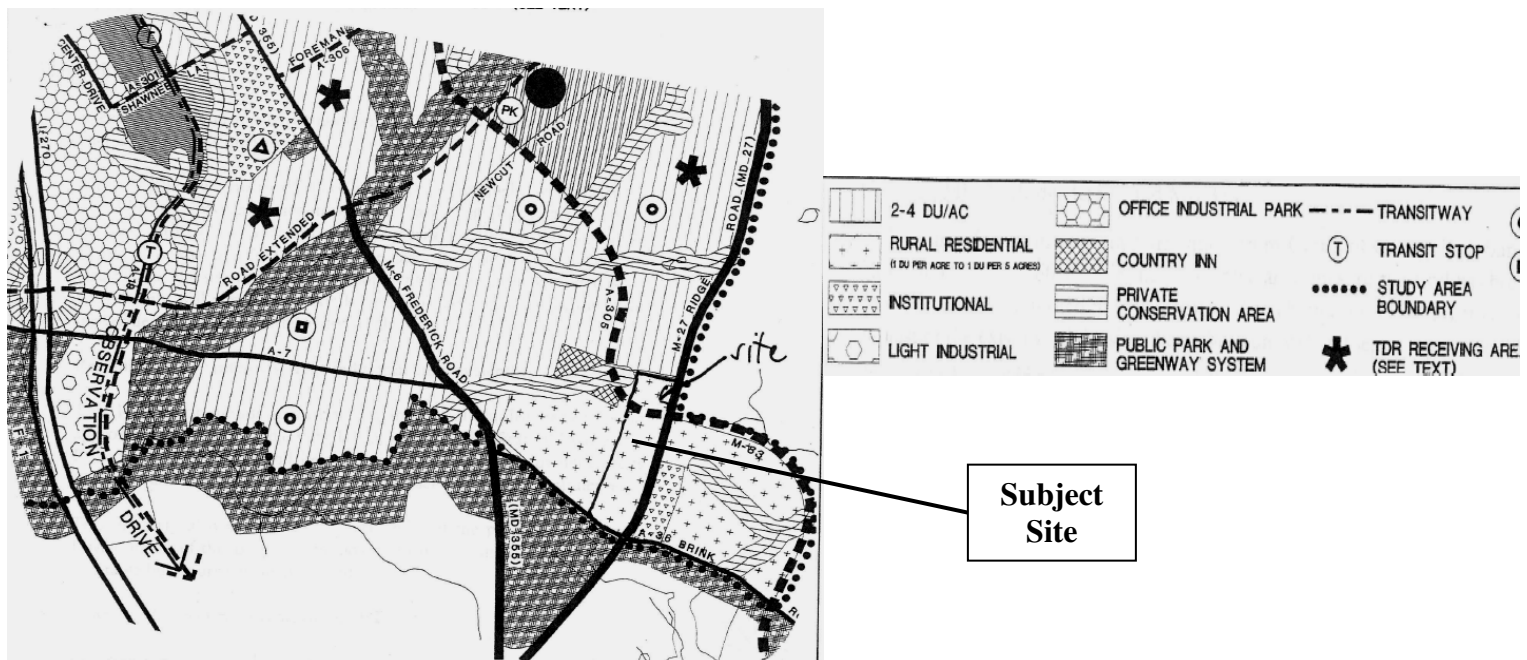
Certainly, great weight should be given to the Planning Board's interpretation of its own Master Plans. As stated in *Watkins v. Secretary, Dept. of Public Safety and Correctional Services*, 377 Md. 34, 46, 831 A.2d 1079, 1086 (2003), "We must respect the expertise of the agency and accord deference to its interpretation of a statute that it administers."

In the present case, we appear to have two different density recommendations in the same Master Plan for the same general area. The rule would ordinarily be that text in a Master Plan would prevail over *e.g.*, colors on a land use map within the Master Plan. *See, e.g., Flying J, Inc. v. Marion County*, 201 Ore. App. 99; 117 P.3d 1027 (2005); however, in this case we have not merely the colors in a map but also text and symbols in at least two maps which call for a lower density than that which

is being proposed. This situation is analogous to a conflict in applicable statutory schemes. The case law instructs us to harmonize conflicting legislative provisions, if possible. In *Maryland-National Capital Park & Planning Comm'n v. Anderson*, 395 Md. 172, 183, 909 A.2d 694, 700 (2006), the Maryland Court of Appeals held:

""[w]here statutes relate to the same subject matter, and are not inconsistent with each other, they should be construed together and harmonized where consistent with their general object and scope." *Gwin v. Motor Vehicle Admin.*, 385 Md. 440, 462, 869 A.2d 822, 834 (2005) [\*\*\*13] (citations omitted); *State v. Ghajari*, 346 Md. 101, 115, 695 A.2d 143, 149 (1997). Therefore, "when two statutes appear to apply to the same situation, this Court will attempt to give effect to both statutes to the extent that they are reconcilable." *Ghajari*, 346 Md. at 115, 695 A.2d at 149 (citations omitted); *Mayor of Oakland v. Mayor of Mountain Lake Park*, 392 Md. 301, 316-17, 896 A.2d 1036, 1045 (2006).

Thus, our effort here should be to carry out the overall objectives of the Master Plan, and to the extent possible, to reconcile any apparent inconsistencies. Turning first to the apparent inconsistency between the quoted text on page 75 of the Master Plan (calling for a density of “two to four units per acre” at the “entry to Clarksburg”) and the map on pg. 77 of the Master Plan (calling for a density of “1 DU per acre to 1 DU per 5 acres” for the subject site), it is helpful to look at the Map in question (Figure 29 from p. 77 of the Plan, in the record as Exhibit 67(a)):



It is apparent from this land use map that the subject site is specified for “Rural Residential” at a density of “1 DU per acre to 1 DU per 5 acres,” as is the subdivision immediately to its west and some of the land across Ridge Road to its east. Much of the area to the site’s north and northwest (*i.e.*, land immediately south and east of Clarksburg) is recommended for the “2-4 DU/AC” category. Thus, one interpretation of the ostensible conflict between the text on page 75 and the map on page 77 of the Master Plan could be that the planners did not intend for the language on page 75 to apply to the subject site, but just to the remainder of the transitional land to its north and northwest, where the map indicates a “2-4 DU/AC” category.

On the other hand, the record in this case clearly establishes that the subject site is within the transitional area into Clarksburg, and indeed will be a primary entry point to that development. 1/14 Tr. 265. Moreover, the record also establishes that the 1994 planners’ reticence to include the subject site in the “2-4 DU/AC” category” was premised on the assumption that public sewer would not be available to this property, an assumption that has been superseded by subsequent developments. Given these factors, the Hearing Examiner agrees with the Planning Board that the best way to give effect to the overall objectives of the 1994 Clarksburg Master Plan is to allow a density in this transitional area of two to four dwelling units per acre. That is the density the 1994 master planners aspired to for the entire transitional area, but felt that they could not completely implement because of the ostensible inability to provide sewer service for the area around the subject site. The proposed development calls for a density of 2.6 dwelling units per acre, well within the preferred range specified for this transitional area by the text of the Master Plan. In sum, the Hearing Examiner concludes that the density proposed by Applicants is consistent with the goals of the Master Plan, now that public sewer service can be provided for the subject site.

One final note on the issue of Master Plan compliance was raised by Applicant Thompson Butz in his testimony (1/14 Tr. 29) and echoed by Jennifer Russel in her testimony (1/14 Tr. 216) – the

1994 Clarksburg Master Plan expressed a goal to “Encourage and maintain a wide choice of housing types and neighborhoods for people of all incomes, ages, lifestyles, and physical capabilities at appropriate densities and locations.” Master Plan, p. 9. Mr. Butz added that the need for senior housing in the County was recognized by the May 2011 Housing Element of the General Plan, contained in Exhibit 34(b), Item SR-3. 1/14 Tr. 30.

The Housing Element of the General Plan was approved by the Council on March 29, 2011, in Resolution 17-78, and adopted by the Planning Board on May 18, 2011. On page 8 of the Housing Element, the Planning Board recognized that “The greatest needs [for housing units in the County] will be for seniors, young households, large families, and people with special needs . . .” The Hearing Examiner concludes that the provision of additional housing for seniors in the County is consistent with the goals of both the Clarksburg Master Plan and the Housing Element of the General Plan.

#### **4. Public Facilities (Transportation, School Capacity and Water & Sewer Service)**

Zoning Ordinance §59-H-2.4 (f) requires that an application for rezoning provide “Sufficient information to demonstrate a reasonable probability that available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application is submitted.”<sup>9</sup> Applicants and Technical Staff provided evidence with regard to transportation, schools, and water and sewer service.

##### **a. Transportation:**

There are three roadways that will service the proposed development, Ridge Road (MD 27), Snowden Farm Parkway (M-83/A-305) and Brink Road (A-36). Snowden Farm Parkway will be constructed by Elm Street Development, which is developing much of Clarksburg Village. Access to the subject site would be from Brink Road and from Snowden Farm Parkway (A-305), extended. The

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<sup>9</sup> In 2010, the County Council changed the name of the Growth Policy to the Subdivision Staging Policy, but both Zoning Ordinance §59-H-2.4(f) and APFO Code §50-35(k)) still refer to the Council’s Growth Policy.



Snowden Farm Parkway access includes two entry points, one to Area A on the south and the other to Area B on the north. The Development Plan proposes internal public streets within 50-foot wide rights-of-way, and single five-foot sidewalks, connecting to a trail that allows pedestrian access to Ridge Road Recreation Park, south of the site, across Brink Road. There is one Montgomery County Ride-On route serving this area, Route #79. This route runs from the Clarksburg Town Center to the Shady Grove Metro station. Exhibit 53, p. 7.

The opposition expressed concerns about the level of traffic that would be produced by the proposed development and for the safety of pedestrians attempting to cross Brink Road to access Ridge Road Recreation Park and those attempting to cross Snowden Farm Parkway (A-305) within the development. Mary Jane Goodrick, testifying on behalf of the Greater Goshen Civic Association (GGCA), predicted that A-305, which goes through the property, will create a tremendous amount of vehicular traffic to and from Clarksburg. Ridge Road and Brink Road will also carry a large volume of traffic. She questioned whether seniors will be able to cross those large roads. Ms. Goodrick testified that GGCA is opposed to this zoning change due to the proposed density and because seniors will be placed in a property surrounded by major traffic, while being unable to exit the property without crossing a major road, whether as a pedestrian or by vehicle. 1/18 Tr. 175-181.

William Hancock testified that he lives in a home that backs up to the Butz property, and he experiences a traffic problem all the time. He added that there is a blind hill on Brink Road and that cars come down at 45 to 50 miles an hour. 1/14 Tr. 288-290.

Ron Wills also expressed concern about the safety of the intersection of Ridge Road and A-305. He estimates that the speed limit will be 40 mph and thinks it will be problematic, splitting the neighborhood in half. This will be a major entrance to Clarksburg Village, so he believe there will be a great deal of traffic. 1/14 Tr. 281-285.

Applicants responded to these concerns with the testimony of Wes Guckert, an expert in transportation planning. 1/18 Tr. 17-68. Mr. Guckert prepared a traffic impact study (Exhibit 38(a)) of the intersections specified by Technical Staff – Route 27 at Brink Road and Route 27 at Skylark Road. He also analyzed the site access intersections, Route 27 and Snowden Farm Parkway, and the Brink Road southern site access. Applying the standard Local Area Transportation Review (LATR) guidelines and Montgomery County trip generation rates, he determined the amount of traffic that will be generated by developments in the pipeline (denominated “Background Traffic”) and added that to traffic counts (*i.e.*, “Existing Traffic”) at the studied intersections. Mr. Guckert then determined the amount of traffic that would be generated by the proposed development, utilizing the Institute of Transportation Engineers trip generation formula for senior adult housing (Exhibit 91). Mr. Guckert estimated that the 140 senior units would generate about 30 morning peak-hour trips, and about 38 evening peak-hour trips (Exhibit 38(a), p. 21). Mr. Guckert then determined the total peak hour traffic by standard critical lane volume (CLV) analysis, using the procedures set forth in the guidelines. He found that the studied intersections at Route 27 and Snowden Farm Parkway (A-305), Brink Road, and Skylark Road, would all fall within the acceptable standards determined by the Planning Commission staff, which is a CLV of 1,425 during the peak hour. 1/18 Tr. 17-23. These results can be seen in a chart from Mr. Guckert’s traffic study (Exhibit 38(a), p. 24):

	Existing Traffic	Background Traffic	Total Traffic
Morning Peak Hour Traffic	LOS/CLV	LOS/CLV	LOS/CLV
MD 27 & Skylark Road	C/1165	C/1199	C/1199
MD 27 & Brink Road	B/1051	C/1217	C/1235
MD 27 & Snowden Farm Parkway	----	A/897	A/902
Brink Road & site access	----	----	A/277
Evening Peak Hour Traffic			
MD 27 & Skylark Road	C/1180	C/1205	C/1205
MD 27 & Brink Road	B/1067	D/1394	D/1406
MD 27 & Snowden Farm Parkway	----	A/851	A/851
Brink Road & site access	----	----	A/377

Mr. Guckert further testified that in his opinion, there is no need for transportation network improvements before Applicants have occupancy and generate traffic from the proposed units. Mr. Guckert concluded that the surrounding transportation network is adequate to handle the traffic that would be generated by the proposed development. 1/18 Tr. 26-28.

Both the M-NCPPC Technical Staff (Exhibit 53, p. 7) and the State Highway Administration (Exhibit 90, p. 2) concurred with Mr. Guckert's report and findings. As stated by Technical Staff, "It is anticipated that the proposed development will meet Local Area Transportation Review (LATR) requirements of the Adequate Public Facilities (APF) review." Exhibit 53, p. 7.

Mr. Guckert also performed a Policy Area Mobility Review (PAMR), and he estimated the PAMR assessment for the project. The proposed Courts at Clarksburg project is in the Clarksburg policy area. For fiscal year 2012, 10 percent of the new trips must be mitigated, or a fee of \$11,700 must be paid for 10% of the trips. Ten percent of 38 trips rounds off to four trips, which must be multiplied times \$11,700. The resulting PAMR mitigation payment, is \$46,800, as shown on page 26 of his traffic impact study. 1/18 Tr. 28-32. Technical Staff confirmed that a PAMR payment of \$46,800 will likely be required.<sup>10</sup> Exhibit 53, p. 7.

In Mr. Guckert's opinion, the proposed circulation systems for pedestrians, vehicles, and bicycles will be safe, adequate and efficient. 1/18 Tr. 33. He estimates that the top third of the development, north of A-305, will exit onto A-305. The middle half of the project will likely exit onto A-305, as well. The southern half of the project, for the most part, is likely to exit out onto Brink Road. With about 40 peak hour trips, there will be about one car every four to five minutes coming out each of the three entrances. In his opinion, it will have a very small impact on traffic. Mr. Guckert

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<sup>10</sup> PAMR has now been superseded by another form of traffic review called Transportation Policy Area Review (TPAR). Since Zoning Ordinance §59-H-2.4 (f) indicates that rezoning applications are to be analyzed by the Growth Policy (now called Subdivision Staging Policy) in effect when the application is filed, and this case was filed well before TPAR went into effect on January 1, 2013, this report does not analyze TPAR. Mr. Guckert testified that the TPAR rules are still being revised. 1/18 Tr. 28-32.

further testified that in his opinion, the access and the sight distance at the Brink Road access point would be safe and satisfactory. He opined that a crosswalk located around the southern access point to the project, crossing Brink Road, would be a safe crossing point for pedestrians. The sight distance that is required by the Department of Transportation is not just for cars; it is for pedestrians as well. In his opinion, there would be no safety issue in establishing a crosswalk at that point to give residents of the proposed project access to the park south of Brink Road. The proximity of the access driveway and the crossing to the intersection of MD 27 and Brink Road, which is signalized, helps create gaps and thus opportunities to cross. 1/18 Tr. 33-37.

Technical Staff agreed that “. . . vehicular and pedestrian circulation will be adequate for the development proposed under this proposal.” Exhibit 53, p. 7. Later in its report, Staff added, “This proposal provides a safe, adequate pedestrian circulation system connecting external and internal sidewalks that move the residents safely through the neighborhood and to the proposed clubhouse recreation center.” Exhibit 53, p. 15. Staff provided more detail on the next page of their report (Exhibit 53, p. 16):

The internal vehicular and pedestrian circulation for the project has been designed to provide clear roadways and sidewalks, as well clear pedestrian crossings from the north-end of the site to the south-end. The internal and external vehicular circulation patterns are safe, adequate and efficient. Access is limited to two entrances, one from Snowden Farm Parkway and the other from Brink Road. Internal roadways have clear circulation patterns, which lead through the development. Pedestrian systems in the proposed plan, for both residents and surrounding neighborhoods, will be improved, continuous, and rational. The perimeter sidewalk flows into an on-site pedestrian circulation system providing access to all residences, open spaces, and the recreation center.

Thus, all the expert evidence – Applicants’ transportation planner, Technical Staff and the State Highway Administration – supported the conclusion that transportation facilities would be adequate for the proposed project. There is also no expert evidence to controvert Mr. Guckert’s testimony that the access and circulation would be safe for vehicular and pedestrian traffic. On the

contrary, Technical Staff strongly endorses Mr. Guckert's findings on this point. Of course, all of these transportation issues will be analyzed in detail at site plan and subdivision reviews.

Based on this record, the Hearing Examiner finds that Applicants have demonstrated that site access and circulation will be safe and efficient, and they have established a reasonable probability that available transportation facilities will be adequate to serve the proposed development.

**b. School Capacity:**

The subject property is located in the area served by Cedar Grove Elementary School, Rocky Hill Middle School and Clarksburg High School. Bruce H. Crispell, Director of the Division of Long-Range Planning, Montgomery County Public Schools (MCPS), stated in an e-mail to Technical Staff dated August 27, 2012 (Attachment 7 to Exhibit 53) that due to the age-restricted nature of the planned community, "there are no school age children anticipated, and therefore no impact on the public schools that serve this area . . ." Technical Staff indicated that no School Facilities Payment will be required. Exhibit 53, p. 5.

Given this record, the Hearing Examiner finds that Applicants have demonstrated a reasonable probability that available school facilities will be adequate to serve the proposed development.

**c. Water and Sewer Service and Other Utilities:**

Technical Staff reports "This Subject Property is not currently served with public water or sewer and is located outside of the recommended water and sewer service envelope, as recommended in the *Clarksburg Master Plan and Hyattstown Special Study Area*, Figure 51, page 202." Exhibit 53, p. 5. Staff noted that in 2001, the property was granted a water and sewer category change, but the public sewer access was restricted to a private institutional use (PIF). Applicants have submitted another category change application to remove the PIF restriction, which would allow unrestricted water and sewer access. In Resolution 17-217, adopted July 19, 2011, the Council specified the existing W-1 public water category, but deferred action on the request for an S-3 sewer category



(without restriction) pending a decision on the instant P-R-C zoning request. According to Staff, Applicants have requested that both this rezoning application and the sewer category change be reviewed simultaneously by County Council.

Technical Staff recognizes that capacity exists to provide public sewer to this property, as confirmed by the Washington Suburban Sanitary Commission (WSSC). Exhibit 53, Attachment 5. Moreover, "Preliminary drawings showing how sewer service can be extended to the Property have been approved by WSSC." Exhibit 53, p. 5 and Attachment 6.

Applicants' civil engineer, Frank Bossong, testified regarding the availability of public water and sewer service for the property. He noted that public water is already available for this property. There are existing 16 inch, 24 inch, 48 inch lines in Maryland Route 27. There is existing 16 inch water main in Brink Road as well, so water access capacity is not an issue. However, when the 1994 Master Plan was adopted, there were sewage capacity and conveyance issues for the area of the subject site. The Crystal Rock Pump Station and the Seneca Waste Treatment Plant had capacity issues, and there was no way to bring sewer from this part of the County to the Seneca Wastewater Treatment Plant. In his opinion, that is why the subject site was designated for the RE-2 Zone. 1/18 Tr. 109-111.

In 2001, the County Council amended the comprehensive water and sewer master plan for development of this area. Capacity was then available at the sewage treatment plant, and at the Crystal Rock Pump Station. A conveyance system (a trunk line) also became available just to the south of the Clarksburg Village subdivision, which would allow this area of the County to have sewer conveyance from the east to the west. Given these new capacities, on March 27, 2001, the County Council changed the designation of sewer category for the subject property from W6-S6 to W1-S3, predicated on a "PIF," a private institutional facility (*e.g.*, a church), being built. In 2009, when this rezoning application was submitted, Applicants also submitted a request that the category change not be restricted to a private institutional facility. In July of 2011, the County Council deferred action on the

category request pending the outcome of the application to rezone the property to P-R-C. Mr.

Bossong noted that the WSSC had determined that water capacity and sewer capacity are available for the proposed development (Exhibit 53, Attachment 5). 1/18 Tr. 109-111.

In 2012, the Maryland legislature passed the Maryland Sustainable Growth and Agricultural Preservation Act of 2012, which requires local jurisdictions across the State of Maryland to create a tier plan for availability of public sewer versus septic fields. This action was based on a concern with the amount of nitrogen runoff going into the Chesapeake Bay, much of which comes from septic fields. Montgomery County, through Park and Planning, came up with tier maps. 1/18 Tr. 112-117. Exhibit No. 92 is a Tier Map covering the subject site, and a more legible version of that exhibit from the Planning Board's website is reproduced below.



As can be seen, the applicable Tier Map designates the subject site as within Tier 2 (also called “Tier II”). Tier 2 is defined as “Future Growth Areas Planned for Sewer.” In September of 2012, the Council adopted SRA-12-01 (Ord. 17-20), which requires public sewer service in any area specified for Tier 2. This legislation has been codified in Montgomery County Code §50-35(e), which provides, in relevant part:

***Sec. 50-35. Preliminary subdivision plans-Approval procedure.***

\* \* \*

*(e) Wells and septic systems. Before the Board approves a plan for lots with individual wells or septic systems, the plan must be approved by the Department of Permitting Services. The Board must review any plan that includes residential lots under the Maryland Sustainable Growth and Agricultural Preservation Act of 2012 (Sections 9-206 and 9- 1110 of the Environment Article, and Section 1-401 and Subtitle 5 of the Land Use Article).*

*(1) The official map displaying the Growth Tier areas as allowed under the Maryland Sustainable Growth and Agricultural Preservation Act of 2012 is on the Planning Department website at <http://www.montgomeryplanning.org/development/>. The Council may amend the official map either by:*

*(A) adopting Tiers in a General Plan Amendment; or*

*(B) an amendment under Section 50-6A.*

*The following is a representation of the map as of September 18, 2012:*

*(2) The Board must not approve any subdivision that would be served by one or more septic systems on land located in the Tier I area.*

*(3) The Board must not approve any major subdivision that would be served by one or more septic systems on land located in the Tier II area. [Emphasis added.]*

As suggested by Mr. Bossong, if Applicants were to apply for one or two acre lots with septic systems on the subject site, the Planning Board would likely reject such an application because it doesn't fit into the proper tier that the Council has mandated. 1/18 Tr. 112-117. Mr. Bossong also testified that Exhibit No. 34(t) shows a preliminary water and sewer layout approved by WSSC as part of their approval letter. Sewage will be collected by gravity to a sewer line that will be located in Snowden Farm Parkway; it will travel east to west to a proposed cul-de-sac in Clarksburg Village, which will be called Castle Oak Court. 1/18 Tr. 118-120. As will be seen in the discussion of the

environment in the next section, there is ample evidence to support the conclusion that approval of unrestricted public sewer access would be the environmentally friendly decision for this property.

Based on this record, the Hearing Examiner finds that both public water and public sewer could reasonably be expected to be available for this development, provided that the Council also approves unrestricted public sewer service for the property.

Finally, there is also evidence that other public facilities and services will be available to serve the subject site. According to Technical Staff (Exhibit 53, p. 5), the subject site is located four miles from the 5<sup>th</sup> District Police Station in Germantown, and it is served by the Hyattstown Volunteer Fire Department. Staff concluded, "Police, fire and rescue services are currently operating within the standards set by the Growth Policy Resolution currently in effect."

Based on the entire record, the Hearing Examiner finds that, although more detail will be produced at subdivision, Applicants have sufficiently demonstrated the adequacy of public facilities at the rezoning stage.

## **5. Environmental Issues**

Applicants' revised Natural Resources Inventory/Forest Stand Delineation (NRI/FSD #420121380) was approved by Technical Staff on May 3, 2012. Technical Staff reports that the site is located within the Clarksburg Special Protection Area (SPA), and there are no streams, floodplains or wetlands on the property. Exhibit 53, p. 8. On January 16, 2013, the Planning Board approved both a Preliminary Forest Conservation Plan (Exhibit 89(a)) and a Preliminary Water Quality Plan (Exhibit 89(b)).

Development Plan Binding Element #3 limits the impervious area of the development to 28 percent of the net lot area of 49.4 acres. Exhibit 94(a). Technical Staff indicates that this limitation is consistent with the Department of Permitting Services' (DPS's) Stormwater Management Design



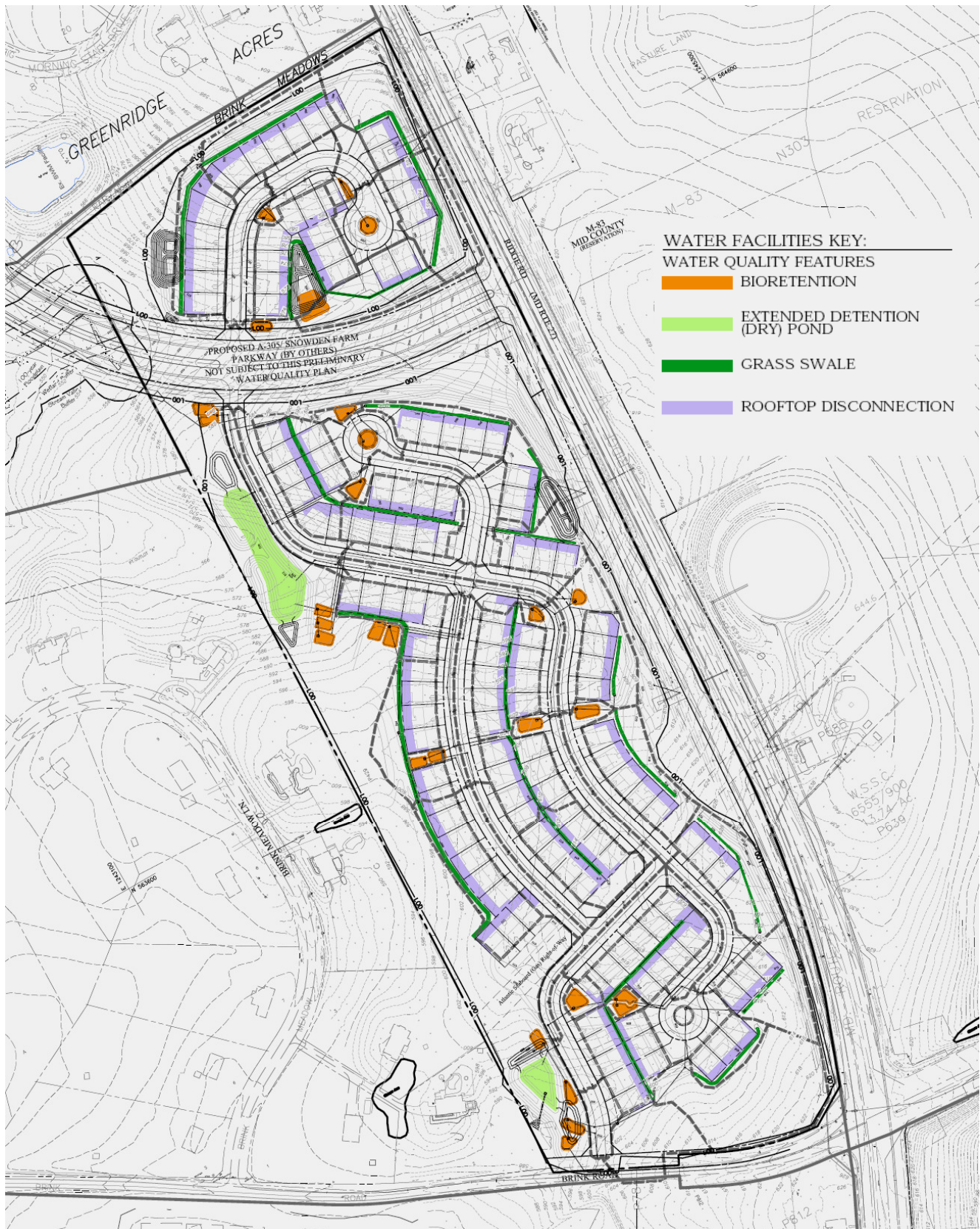
Computations. Exhibit 53, p. 8. Stormwater management and forest conservation are discussed below, followed by a section addressing environmental benefits of public sewer over septic fields.

**a. Forest Conservation:**

Forest conservation issues were discussed at some length on pages 21-23 of this report in connection with Applicants' vision for this development. As mentioned there, the only forest on the site is the northwestern corner of the property. Applicants' plans show on-site afforestation to the north, to the west, and to the south, on the corner of Brink Road and Route 27, all of which will provide screening for the surrounding area. 1/14 Tr. 80-84. The afforestation areas, as provided for in Applicants' approved Preliminary Forest Conservation Plan (PFCP - Exhibit 41(c)), are depicted on page 22 of this report. No forest will be cleared; 0.21 acres of forest will be retained; and there will be 7.2 acres of afforestation, which is more than 35 times the amount of existing forest on site. These areas will be protected in perpetuity through a Category One Conservation Easement, which is the most restrictive of easements that is entered into with the Planning Board. All three of these planting areas will probably be planted with a mix of evergreen and deciduous species to create a diverse forest community that will provide screening and transition to the adjacent neighborhoods. 1/18 Tr. 75-77. Technical Staff reports that the afforestation to be provided on-site will meet the requirements of County Code §§22A-12(d) and 22A-12(f)(2)(C). Exhibit 53, pp. 8-9.

**b. Stormwater Management and Sediment Control:**

The stormwater management concept for the subject site was conditionally approved by the Department of Permitting Services (DPS) on November 14, 2012, as part of its conditional approval of the preliminary water quality plan (Exhibit 34(s)). Exhibit 53, Attachment 14. Exhibit No. 34(s), which is reproduced on the next page, illustrates the different types of stormwater management facilities that are being proposed for the project.



Applicants' civil engineer, Frank Bossong, testified that the State of Maryland requires that Applicants meet environmental site design (ESD) standards. The orange symbols on the above preliminary water quality plan are bioretention facilities, which are scattered throughout the project. The lighter green areas are extended detention dry ponds. Grass swales (darker green) will help transport some of the water and infiltrate it back into the ground. Downspouts spread the water out, also promoting infiltration into the ground. This network of ESD facilities maximizes the amount of stormwater recharge back into the ground, and in his opinion, will meet the full ESD requirements. They will bring the entire property back to a level of woods in good condition. The amount of runoff will be less than what is happening today with the current plantings and farming operations. None of these measures will hurt the well systems off the property. In Mr. Bossong's opinion, these measures will meet all State and County requirements. 1/18 Tr. 91-98.

Mr. Bossong stated that the dry ponds typically accumulate two to four feet of water, which dries up over a 12-hour period. He further testified that even if both the dry ponds on the west were made smaller, so as to allow for a greater amount of screening in those areas, Applicants could still meet all of the environmental site design requirements, both for the State and the County. 1/18 Tr. 98-101. He feels that State and County requirements would be met even without these dry ponds, but they would help to reduce any flow of stormwater onto the neighbors' properties in big storms. He noted that Applicants had worked to minimize the amount of sediment and earth moving, and have agreed with the County agencies that the sediment control measures during construction will be designed at a capacity of 125 percent of what is required. 1/18 Tr. 103-106.

Given this testimony, the Hearing Examiner recommends that the Council, in a resolution approving the rezoning and the development plan, specify that it is not precluding a reduction in the size of the retention ponds to allow further screening on the west, should the Planning Board determine that is advisable at Site Plan and Subdivision reviews. A note was added to the

development plan to ameliorate the concern of the adjacent neighbors to the west about the adequacy of screening next to the “dry pond” stormwater management facilities planned for the site:

Applicant will plant screening trees in the area adjacent to the proposed extended detention (dry) ponds shown on Exhibit 34-S to the extent that governmental agencies allow reduction in the size of SWM facilities as determined by final agency design approval. If no space for additional planting is created on the subject property by the final agency design approval, screening trees will be installed on Lot 2, Lot 12 and Outlot A along the common boundary line with the subject property, in accordance with a letter of agreement between the Applicant and the owners of said lots.

Technical Staff concluded that “The site is in compliance with the requirements of Chapter 22A, Forest Conservation and Chapter 19, Water Quality. . . . The Property by its nature is relatively flat and does not contain any excessive steep slopes that would otherwise cause concern for erosion or require unreasonable grading to allow development. . . .” Exhibit 53, p. 16.

Based on this record, the Hearing Examiner finds that forest conservation, stormwater management and erosion controls are all consistent with State and County requirements.

**c. Environmental Benefits of Public Sewer over Septic Fields:**

Dusty Rood, Applicants’ expert in environmental planning, water quality and forest conservation, testified that it has become increasingly public policy, at the Federal, State and local level, to deal with the issue of protecting the Chesapeake Bay by reducing the amount of nutrients, specifically nitrogen and phosphorus, reaching the water.

Both the preliminary water quality plan and the planned afforestation support this goal. However, the nature of the present farming use presents a challenge to water quality, in and of itself, through the ongoing application of fertilizers and herbicides to manage the agriculture, as well as the cultivation and seasonable tilling of the soil, and turning it over, which exposes it to erosive forces. The water quality plan addresses this issue through integration of “best management practices” (BMPs) and environmental site design, which seeks to create a hydrologic condition comparable to woods in good condition. It does that by decentralizing and distributing smaller best management



practices throughout the property, which will ultimately reduce the amount of runoff, and prevent runoff from accumulating. That runoff then filters naturally through mulch and other soil media. Applicants will also minimize impervious surfaces to the extent feasible for the project. 1/18 Tr. 71-75.

Mr. Rood further testified that another key to protecting the environment is to dispose of sewage through the public sewer system and not through private septic. Doing so will help to minimize the amount of nutrients, particularly nitrogen, entering the watershed. Homes that are built on private septic systems load as much as 10 times the amount of nitrogen into the watershed as do public sewer facilities that treat them in a centralized wastewater treatment plant such as the Seneca Wastewater Treatment Plant. Also, by connecting into the public water system, Applicants would not be utilizing on-site wells which would extract water from the local aquifer. 1/18 Tr. 77-78.

Given the nature of this use as an active-adult community, the yards and the landscaped facilities will be maintained by a common landscape contractor, as opposed to effectively 140 individuals taking care of their lawns. As such, it is much easier to control not only the aesthetics of the community, but also how the lawns are cared for, including restricting fertilization in order to prevent runoff of nutrients. All of those measures combined will actually help to reduce the amount of nitrogen, phosphorus, and sediment that is currently running off the property. Nitrogen will be reduced by at least 18 percent, phosphorous and sediment by more than 50 percent from the existing condition, just simply by the nature of the land uses and the combination of the practices that are proposed for this site. 1/18 Tr. 80.

There is no contrary evidence in the record, and the Hearing Examiner finds that the nature of the proposed use, as well as the requirement to use the public sewer system, rather than private septic

fields, will reduce the amount of nitrogen, phosphorus, and sediment that is currently running off the property and will thereby improve the environment.

These environmental issues will be reviewed at subdivision, but based on the record in this case, the Hearing Examiner finds that the proposed development would result in a net benefit to the environment, and that there are no environmental issues warranting denial of this application.

## **6. Historic Preservation Issues**

Another issue raised by Technical Staff in its report is the possible impact of the proposed development upon a nearby historic resource, the Howes Farm (Yegher Country Inn), a site listed in the Master Plan for Historic Preservation (#13/19). The Howes Farm is just northwest of the subject property, and its location is shown on the map and areal photograph reproduced on pages 12 and 13 of this report. A ground level photograph of the Howes farm house was provided by Staff, and it is reproduced on page 15 of this report (Exhibit 53, pp. 2-3).

Technical Staff did not list this historic resource as a reason for denying this application in the body of its report, but Staff did attach a memorandum, dated September 17, 2009, from Scott Whipple, Supervisor of the Historic Preservation Section, recommending denial of the application because “[t]he proposed zoning application would allow a density of development on the subject property that would be incompatible with the adjacent historic resource and its rural character.” Exhibit 53, Attachment 1. On the other hand, Mr. Whipple recognized, in the last paragraph of his memo, that the application “does not directly involve” property listed in the Master Plan for Historic Preservation or in the Locational Atlas and Index for of Historic Sites, and he concluded that “the subject property is not subject to any regulatory review by the Historic Preservation Commission under Chapter 24A of the County Code.” Exhibit 53, Attachment 1.

Applicants addressed the historic preservation issue directly in the testimony of their land planner, Gary Unterberg. In Mr. Unterberg’s opinion, the rationale for Mr. Whipple’s memorandum

has been superseded by subsequent events. On December 10, 2010, the Planning Board approved Mandatory Referral No. MR2010814, which calls for the extension of A-305, Snowden Farm Parkway, west of Ridge Road. A-305 will thus travel through the subject site and through the Yegher property. This fact and its impacts on the historic site are explained on page 6 of Technical Staff's December 6, 2010 memorandum to the Planning Board on the subject. Exhibit 34(b), Item R-2.

. . . The proposed road traverses the environmental setting of MP#13/19. On particular note, the proposed road alignment would cross the property's driveway approximately 440 feet east of the house, separating the property from its access to an existing road - Ridge Road (MD27) . . . The Historic Preservation Commission must review and approve that portion of the project within the environmental setting prior to permit issuance.

According to Mr. Unterberg, the boundaries of the environmental setting have effectively been reduced to the farm house itself. Moreover, houses in the Green Ridge Acres neighborhood are much closer to the historic farm house than the proposed development will be. The closest house in Green Ridge Acres is approximately 400 feet from the historic house, while the closest house in the proposed development will be over 800 feet from the historic resource. 1/18 Tr. 136-145.

In sum, the observations by Mr. Whipple are no longer applicable because the historic setting was subsequently cut back to include just the Yegher house as a result of the A-305 approval. In Mr. Unterberg's opinion, the proposed development will not adversely affect the historic resource. 1/18 Tr. 136-145.

There is no evidence in the record to contradict Mr. Unterberg's observations and conclusions. Given this state of this record, the distance of the proposed development from the historic farm house, and the fact, as recognized by Mr. Whipple, that the application "does not directly involve" property listed in the Master Plan for Historic Preservation or in the Locational Atlas and Index for of Historic Sites, the Hearing Examiner finds that the subject application will not have an adverse impact on the historic resource warranting denial of the application.

### **E. Community Concerns**

As previously mentioned, this application is supported by Elm Street Development, the developer of Clarksburg Village (Exhibits 60, 80(c) and 97), and by a number of individual County residents (not neighbors of the site) who wrote letters expressing the need for more senior housing in the County. Exhibits 50, 58, 59, 73, 75, 76, 77, 81 and 82.<sup>11</sup>

The only community testimony in support of the project came from Katherine Kubit, Vice President of Elm Street Development. She testified that the primary entrance to Clarksburg Village will be through the subject site, along the future Snowden Farm Parkway (*i.e.*, A-305). 1/14 Tr. 265. Ms. Kubit noted that Clarksburg Village is a 2,700-unit community, and that she testified to voice Elm Street's "very strong support for this particular project and the local map amendment for this project." 1/14 Tr. 251-252.

Elm Street is also planning an affordable multi-family, senior housing project in Clarksburg Village for 100 low-income seniors. However, that project is very different from this one. It will be rental housing, affordable and multi-family. There is no other senior or active-adult community in Clarksburg, and Ms. Kubit feels that this is a disservice to the Clarksburg community. She gets many questions from residents about finding some place where their parents can move. 1/14 Tr. 252-254. Elm Street has extended an invitation to Applicants to join the Clarksburg's Village Home Owners Association, if the proposed development gets approved, and they wish to do so. 1/14 Tr. 254.

The application is opposed by the Greater Goshen Civic Association (GGCA), the Clarksburg Civic Association (CCA) and numerous neighbors. Exhibits 48(a), 51, 52(a) and 52(b). Nineteen individuals signed one of the opposition letters. Exhibit 52(a). Concerns expressed by the civic associations and the neighbors include the adding of density to the area, alleged Master Plan non-

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<sup>11</sup> A number of e-mails and letters in support of the project were not admitted into evidence because they were either unsigned (Exhibits 57 and 74(a) and (b)) or filed after the hearing (Exhibits 98(a) – (d)), or both (Exhibits 99(a) – (k)).



compliance, potential traffic impacts,<sup>12</sup> lack of on-site recreational facilities, inadequate screening, noise, dust, light pollution, loss of pastoral scenery, possible breeding of mosquitoes in the proposed stormwater management ponds and effect on property values. Opposition testimony was provided by Mary Jane Goodrick and Robert Goldberg, on behalf of the Greater Goshen Civic Association, as well as by neighbors Ron Wills and William Hancock, both of whom live in the adjacent Brink Meadows subdivision. No representative of the Clarksburg Civic Association testified at the hearing.

Most of the concerns raised by the opposition have been addressed already in other parts of this report. Density and Master Plan issues were discussed in Part III.D.3 of this report in connection with Master Plan Compliance (pp. 32-41); potential traffic impacts were discussed in Part III.D.4(a) of this report (pp. 41-46); lack of on-site recreational facilities was discussed in Part III.D.1. of this report (pp. 15-19); and screening issues were discussed in Part III.D.1 of this report (pp. 21-23). The remaining concerns – noise, dust, light pollution, loss of pastoral scenery, possible breeding of mosquitoes in the proposed stormwater management ponds and effect on property values – are addressed below.

Regarding possible noise, dust and light from the development, Applicants' land planner, Gary Unterberg, testified that the noise from the planned single-family residential homes will be similar to the noise from the existing single-family homes either in the RE-2 or the R-200 zones west and north of the site, but typically a senior community would be quieter than a community that is full of children, with the type of outdoor activities common for younger residents. 1/14 Tr. 187. Mr. Unterberg further testified that there would likely be less dust produced in the proposed development

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<sup>12</sup> One of the traffic concerns raised by the Clarksburg Civic Association involved a possible restriction preventing existing homeowners from accessing Route 27. Exhibit 51. Mr. Unterberg testified that this concern had nothing to do with the proposed development, but rather is off-site and involves property to the north of the application area. 1/14 Tr. 86-91. No CCA representative appeared at the hearing to clarify their point. As far as the Hearing Examiner can tell from the evidence presented by Mr. Unterberg, the concern involves a completely different application with a completely different set of issues, not part of this application. Therefore, this concern will not be further addressed in these proceedings.

than that which is produced by the present use, a farm that is being tilled, spring and fall. Planting and harvesting make a lot of dust, but once the site is developed, the dust will be stabilized. As to light pollution, County regulations require that Applicants capture any light on-site with cutoff fixtures so that it does not intrude into the surrounding properties. Those particulars will be detailed out at site plan review. 1/14 Tr. 188-189. There was no contrary evidence presented on these points, and the Hearing Examiner finds that the record does not support a claim that the proposed development will produce noise, dust or light at levels adverse to the surrounding area or greater than the existing zone would permit.

With regard to the concern over the loss of pastoral scenery, Mr. Unterberg noted that the site is currently zoned residential, not agricultural, so if it were developed under the current zone, there would still be houses built on the property. 1/14 Tr. 188-189. The worry about mosquitoes breeding in the stormwater management ponds was laid to rest by the evidence that the planned “ponds” would actually be “dry ponds.” As stated by Mr. Unterberg, the two stormwater “ponds” planned for the site, one on the northwestern side of Area A and the other on the southwestern corner of Area A, will be dry facilities and will be landscaped. There is an existing hedgerow, and the dry ponds will be primarily lawn area. When there is a storm event, they will fill up with water. 1/14 Tr. 152-155. Applicants’ environmental expert, Dusty Rood, testified that ongoing maintenance will help to ensure that areas that are supposed to infiltrate water will continue to infiltrate water, and will prevent standing water, which is what creates the environment for breeding mosquitoes. Thus the environment will not be present for the growth of mosquito larvae. 1/18 Tr. 83-89.

There was no evidence presented by the opposition that the proposed development would reduce property values in the surrounding area, and Applicants therefore produced no rebuttal on the point. In the absence of any evidence, the Hearing Examiner can reach no conclusions on this issue.

A few more words should be said about the opposition's concerns regarding density, screening and compatibility. Mr. Unterberg noted that the P-R-C zone provides setbacks for compatibility based on the adjacent zone. This project exceeds those setbacks on all four sides of the subject property, particularly as to the western edge requirement of a 35-foot setback, which is the rear yard setback for the RE-2 Zone. This development will exceed that, on average, up to three times the 35-foot requirement. 1/14 Tr. 145-152. Technical Staff confirms that the proposed development would meet or better all the development standards of the zone. Exhibit 53, p. 12. The Hearing Examiner finds that these larger setbacks help improve compatibility with the surrounding areas.

As to compatibility, Technical Staff found that the proposed use is similar in nature to all the uses surround the site, in that all are residential. However, Staff felt that the proposed density exceeded that which was recommended in the Master Plan, thereby reducing compatibility. Exhibit 53, p. 15. On the other hand, the Planning Board found the opposite: "The Development Plan provides a low density transition which, coupled with the forest buffers and setbacks, provides compatibility with the surrounding community." Exhibit 54, p. 2.

It should be mentioned in this regard that Applicants have significantly reduced the density planned for this site. Applicants' original development plan (Exhibit 8) called for 221 dwelling units, which has now been reduced to a maximum of 140 units (Exhibit 94(a)). William Hancock, who owns the adjoining property to the west of the site, objected to the proposed density when compared to the two-acre lots in his subdivision, but he admitted on cross-examination that when he bought his property and started building the houses, the Master Plan that people relied on at that time (*i.e.*, prior to 1994) recommended R-200 zoning on the Butz property. Thus, both his property and the subject site had been zoned R-200 (*i.e.*, half-acre lots, not two-acre lots) when his development was built. The current proposal is not far off that figure, at 2.6 dwelling units per acre. 1/14 Tr. 294-297.

Finally, ample screening is planned for the site to aid in compatibility, especially to the north, the west and the south, as shown on pages 21-23 of this report. Moreover, a note has been added to the final development plan, by which Applicants agree to plant screening trees in the area adjacent to the proposed extended-detention (dry) ponds to the extent that governmental agencies allow reduction in the size of these stormwater management facilities, or even to add screening trees to the adjacent lots if no space is available next to the dry ponds on the subject site.

Based on this record, the Hearing Examiner finds that Applicants have appropriately addressed all of the concerns raised by Technical Staff and the community, and that none of those concerns warrant denial of this application.

#### **IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Zoning involves two basic types of classifications: Euclidean zones and floating zones. The term “Euclidean” zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development such as permitted uses, lot sizes, setbacks and building height.

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, *i.e.*, it satisfies the purpose and regulations of the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

The P-R-C Zone is among the floating zones that provide for design specifications as part of a development plan. Applicants are afforded considerable design flexibility if development standards



for the zone are satisfied. In exchange for that flexibility, development under the P-R-C Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the P-R-C Zone. *See* Zoning Ordinance §59-D-1.11. If approved, the development plan will provide basic design parameters for the site, much as the Zoning Ordinance provides design specifications for more rigidly applied zones. Normally, a development plan is expected to contain sufficient precision to fix the land use, height, density and bulk of the proposed development, which are basic components of compatibility, and to provide design specifications that govern post-zoning reviews.

#### **A. Standards for Council Review**

Section 59-D-1.61 of the Zoning Ordinance requires the District Council, before it approves any application for reclassification to the P-R-C Zone, to consider whether the application, including the development plan, fulfils the “purposes and requirements” set forth in Code Section 59-C for the new zone. In making this determination, the law expressly requires the District Council to make five specific findings, “in addition to any other findings which may be necessary and appropriate to the evaluation of the proposed reclassification.” Therefore, these findings are an essential part of the Hearing Examiner’s Report and Recommendation. They relate to consistency with the Master Plan and other County policies, compliance with the requirements of the zone, compatibility with surrounding development, circulation and access, preservation of natural features, and perpetual maintenance of common areas.

The five specific findings required by §59-D-1.61 of the Zoning Ordinance are:

(a) *[That t]he zone applied for substantially complies with the use and density indicated by the master plan or Master plan, and does not conflict with the general plan, the county capital improvements program, or other applicable county plans and policies. . . .*<sup>13</sup>

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<sup>13</sup> The remainder of this section concerns procedures utilized when Applicants seeks to exceed the height or density recommended in the Master Plan in order to allow the inclusion of MPDUs or workforce housing on site. There will be no

*(b) That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.*

*(c) That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.*

*(d) That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.*

*(e) That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.*

Because the general requirement of the law – that the application must fulfill the “purposes and requirements” of the new zone – is subsumed in the language of the five specific required findings (especially in subsection (b)), a determination that the five findings have been satisfied would satisfy the Montgomery County Zoning Ordinance. However, in addition to these five findings, Maryland law also requires that the proposed rezoning be in the public interest. As stated in Maryland Land Use Article, Code Ann. § 21-101(a)(4)(i) (2012),<sup>14</sup>

*(i) planning, zoning, or subdivision control powers in the regional district [must be exercised to:]*

*(1) guide and accomplish a coordinated, comprehensive, adjusted, and systematic development of the regional district;*

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workforce housing located on this site, and Applicants are not relying on this section to exceed either the height or density limitations.

<sup>14</sup> Effective October 1, 2012, the Regional District Act, Article 28, Md. Code Ann., was re-codified, without a change in substance, into a new “Land Use Article.” Section § 21-101(a)(4)(i) of the Land Use Article contains the rough equivalent of the previous language in Article 28, Md. Code Ann., § 7-110.

*(2) coordinate and adjust the development of the regional district with public and private development of other parts of the State and of the District of Columbia; and*

*(3) protect and promote the public health, safety, and welfare.*

In sum, there are six findings required (§59-D-1.61(a) through (e) and the public interest). The “Required Findings” in the next part of this report are organized in the order set forth in the statute to facilitate review.

## **B. Required Findings**

### **1. County Plans and Policies**

The first required finding is that:

*The zone applied for substantially complies with the use and density indicated by the master plan or Master plan, and does not conflict with the general plan, the county capital improvements program, or other applicable county plans and policies. . . .*

#### **a. The Applicable Master Plan or Sector Plan**

The subject site is located within the area governed by the Clarksburg Master Plan and Hyattstown Special Study Area, approved and adopted in 1994. For the reasons discussed extensively in Part III.D.3 of this report (pp. 32-41), the Hearing Examiner finds that the proposed development substantially complies with the use and density recommendations of the Master Plan, when one interprets the Master Plan with due consideration for its goals and objectives and in light of developments since it was adopted. The proposed use is residential, which is consistent with the use proposed by the Master Plan, and the proposed density of 2.6 dwelling units per acre is consistent with the density of “two to four units per acre” recommended on page 75 of the Master Plan for the Brink Road Transition Area; however, it is inconsistent with the density recommended for the site elsewhere in the Plan based on the supposed unavailability of public sewer service. Master Plan pp. 77 and 97.

Because of the recommendations found on pages 77 and 97 of the Master Plan, Technical Staff concluded that the proposed Development Plan fails to comply with the Master Plan's density recommendations. The Planning Board rejected Technical Staff's interpretation of the Master Plan, stating (Exhibit 54):

The Planning Board further concluded that the local map amendment application substantially complies with the 1994 *Clarksburg Master Plan and Hyattstown Special Study Area*. The Planning Board believes that proposed rezoning and associated Development Plan meet the overall goals and density of the Brink Road Transition Area and provide an appropriate transition from the Germantown Master Plan Planning Area to the Clarksburg Master Plan Area.

The Board weighed these elements against the density recommendation on the master plan zoning map and considered them more persuasive and a stronger indicator of the master plan's objectives. The Development Plan provides a low density transition which, coupled with the forest buffers and setbacks, provides compatibility with the surrounding community.

The Hearing Examiner finds the Planning Board's unanimous interpretation of its Clarksburg Master Plan to be more persuasive than Technical Staff's interpretation, and more likely to produce a result in the public interest.

**b. The General Plan and the County Capital Improvements Program**

The General Plan incorporates the applicable Master Plan, and therefore compliance with the Master Plan is tantamount to compliance with the General Plan. In addition, for the reasons set forth on pages 40-41 of this report, the Hearing Examiner concludes that the provision of additional housing for seniors in the County is consistent with the goals of both the Clarksburg Master Plan and the Housing Element of the General Plan.

Applicants specify in their Land Use and Engineering Report revised in July of 2012, that "This proposal will not require any County funded capital improvement program to be implemented." Exhibit 34(a), p. 22. Although a series of road improvements are planned in the area to be funded by



other developers, “the Courts [of Clarksburg] Development will not rely on the timing of adjacent road construction . . .” Exhibit 34(a), p. 15.

The Hearing Examiner finds, based on the evidence of record, that the proposed development is consistent with the General Plan and does not impact the County’s Capital Improvements Program.

**c. Other County Policies (Growth Policy and Adequate Public Facilities Ordinance)**

Under the County’s Adequate Public Facilities Ordinance (“APFO,” Code §50-35(k)), the Planning Board has the responsibility, when it reviews a preliminary plan of subdivision, to assess whether the following public facilities will be adequate to support a proposed development: transportation, schools, water and sewage facilities, and police, fire and health services. The Planning Board’s application of the APFO is limited by parameters that the County Council sets in its Growth Policy.<sup>15</sup> While the ultimate test under the APFO is carried out at subdivision review, evidence concerning adequacy of public facilities is relevant to the District Council’s determination in a rezoning case as to whether the reclassification would serve the public interest.

The Planning Board considers the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated. There is no such evidence in this case. On the contrary, the evidence is that both police and fire stations are nearby. Exhibit 53, p. 5. The remaining three public facilities – transportation, schools and water and sewer service – were discussed at length in Part III.D.4 of this report (pp. 41-50). Of course, part of that discussion involves the availability of public sewer service, which is critical to the proposed development. All of the evidence indicates that public sewer service is physically available to the site, if the sewer lines are extended as planned by Applicants and approved by the WSSC (Exhibit 53, Attachments 5 and 6); however, in order to connect to the public sewer

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<sup>15</sup> In 2010, the County Council changed the name of the Growth Policy to the Subdivision Staging Policy, but both Zoning Ordinance §59-H- 2.4(f) and APFO Code §50-35(k)) still refer to the Council’s Growth Policy.

system, the Council must approve Applicants' pending application for reclassification to the unrestricted S-3 sewer category.

Such an approval would be consistent with Council and State policy, as reflected in the applicable Tier Map designating the subject site as within Tier 2 (also called "Tier II"). Tier 2 is defined as "Future Growth Areas Planned for Sewer." In September of 2012, the Council adopted SRA-12-01 (Ord. 17-20), which requires public sewer service in any area specified for Tier 2. This legislation has been codified in Montgomery County Code §50-35(e), and it is designed to improve the environment by reducing chemical runoff into the Chesapeake Bay.

Based on this record, the Hearing Examiner finds that both public water and public sewer could reasonably be expected to be available for this development, provided that the Council also approves unrestricted public sewer service for the property. For the stated reasons, the Hearing Examiner finds that Applicants have sufficiently demonstrated the adequacy of public facilities at the rezoning stage.

The proposed P-R-C Zone is also clearly consistent with County policy of providing additional senior housing, as discussed at pages 20-21 of this report.

In sum, based on this record, the Hearing Examiner finds that the requested rezoning does not conflict with "other applicable County plans and policies."

## **2. Zone Requirements, Safety, Convenience and Amenity of Residents and Compatibility with Adjacent Development**

The second required finding is:

*That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.*

**a. Compliance with Zone Purposes, Standards and Regulations**

The P-R-C Zone is a “floating zone,” and its purpose and regulations are found in Zoning Ordinance §§59-C-7.41 to 7.49.

The purpose clause for the P-R-C Zone is set forth in Section 59-C-7.41, quoted below:

*The purpose and intent of the P-R-C zone is to provide for the establishment of a planned retirement community type of development, accessible to or providing within it most of the day- to-day recreational, medical, retail, commercial and similar services required by the residents thereof, in accordance with the comprehensive development plan approved by the Planning Board and so designed as to achieve a maximum of coordination between the development and the surrounding uses, including a maximum of safety, convenience and amenity for the residents of the development. Such developments are limited to areas that have adequate highway access, public water and sewer, and public services. Consideration must be given to the size of development (in acres) and the use of the site when determining whether day-to-day services and public facilities must be provided. Such developments must be designed to have a minimum of impact upon surrounding land and to provide adequate open spaces adjacent to their boundaries.*

*In addition, it is the purpose of this zone to preserve and take the greatest possible aesthetic advantage of existing trees and to minimize the amount of grading necessary for construction of a development.*

Applicants’ land planner, Gary Unterberg, opined that the proposed development would provide adequate medical, retail, commercial and similar services to serve the residents of the community, in accordance with the purpose clause of the P-R-C Zone. 1/14 Tr. 134-136. However, Technical Staff concluded that the proposed development would not satisfy the purpose clause because “the Property is not within the recommended water and sewer service envelope and . . . it does not contain the day-to-day services generally anticipated with a planned unit development. . . .” Exhibit 53, p. 9. Once again, the Planning Board disagreed with its Staff, stating (Exhibit 54, p. 1):

The Planning Board concluded that the proposed development did meet the purpose and intent of the Planned Retirement Community Zone. The Planning Board found that the location of the site within a short drive of shopping centers and other amenities, with a community center on site and a park within walking distance, satisfied the requirement in the purpose clause for adequate access to day-to-day and recreational services.

Both of the issues raised by Technical Staff were addressed at length earlier in this report. The sewer service issue was discussed in Part III.D.4.c (pp. 46-50) and the access to day-to-day services was discussed in Part III.D.1 (pp. 17-19). Technical Staff admits that “connection to water and sewer is technically feasible . . .,” but because of its concerns about Master Plan compliance, Staff does not feel that these services are available to the site, as required by the Purpose Clause. Exhibit 53, p. 9. The Hearing Examiner came to the opposite conclusion, based on the referenced discussion of State law, the Tiers Map and Council legislation on the point, provided that the Council also approves public sewer service for the property without a PIF restriction.

As to the meaning of the purpose clause’s language regarding access to services, the testimony of Applicants’ Master Plan expert, Jennifer Russel, is instructive. It is paraphrased below:

In 1994, the P-R-C Zone did not permit its use on parcels that were under 750 acres. There have been three separate efforts to change that over the history of the zoning text amendments. In 2002, ZTA 2-05 split the P-R-C zone into two categories, one for properties with a minimum lot size of 25 acres and one for properties of at least 750 acres. However, the 2002 ZTA did not change the requirements for services to be provided on site. In 2006, ZTA 06-18 was introduced to allow the necessary services and facilities to be accessible to properties that were in the 25 acre category, but not necessarily provided on site. That amendment was never adopted, but in 2007, ZTA 06-27 was adopted, and it did allow off-site services. This ZTA added language to the purpose clause, indicating that a smaller P-R-C may not have to contain all the services on-site, and in such communities, services could alternatively be available off site. This change allowed a 25-acre site to enjoy the P-R-C without burdening it with the provision of on-site services that could be easily accessible off-site. That is the current language in the zoning ordinance today. 1/14 Tr. 232-233.

The Hearing Examiner is persuaded, both by the legislative history of the current purpose clause and by the Planning Board’s reasoning, that the limited on-site services and the availability of off-site services, accessible to the future residents of the proposed development, together satisfy the purpose clause on this point.

With regard to the language of the purpose clause calling for highway access and minimal impact on surrounding land, Technical Staff found that “The Property has good access to the adjacent

major roadways, and . . . [t]he proposed development has avoided impact to sensitive natural resources. Particularly, it avoids the buffer, provides ample green buffers, forested areas and has to the extent possible, minimized impervious surfaces for purposes of water quality.” This evidence is undisputed.

Based on this record, the Hearing Examiner finds that the proposed development will satisfy the purpose clause of the P-R-C Zone. The development standards for the P-R-C Zone are contained in Zoning Ordinance §§59-C-7.42 to 7.49. Mr. Unterberg testified that the proposed development would meet or better all the development standards of the zone. 1/14 Tr. 145-150. Each applicable section is discussed below.

Section 59-C-7.42 specifies that the only development permitted in the P-R-C Zone is a planned retirement community, which is the case here. Subsection 59-C-7.421(b) specifies that in a development of less than 750 acres, there must be dwelling units, meeting rooms, and recreational facilities consistent with the size of the project. The Development Plan in the subject case does call for dwelling units, meeting rooms in an on-site community center, a community garden, pedestrian sidewalks and bike trails on site. Exhibits 939a) and (b). There will also be access to nearby parks and facilities in Clarksburg Village and its environs. As previously mentioned, Technical Staff feels that is insufficient, while the Planning Board disagrees.

Given the Planning Board’s conclusion, the Hearing Examiner finds that the proposed facilities meet the minimal standards required at the rezoning stage, recognizing that the available facilities will be re-examined by Technical Staff and the Planning Board as part of Site Plan review.

Subsections 59-C-7.422 and 59-C-7.423 specify permitted uses and special exception uses allowed in the Zone. No use is proposed by Applicants that would violate these provisions. In fact,



§59-C-7.423 is not applicable to the proposed development, since it pertains only to “age-unrestricted area[s],” and Applicants are not proposing any age-unrestricted areas.

Section 59-C-7.43 requires that each P-R-C zone must have a gross tract area of at least 25 acres, and this proposal more than meets that minimum, with a gross tract area of 54.3 acres.

Section 59-C-7.44(a) provides:

*A planned retirement community of less than 750 acres must be restricted to permanent residents 50 years of age or over, except, that a disabled relative may reside with a permanent resident. In addition, residence must be regulated in accordance with the provisions of the Fair Housing Amendments Act of 1988, as may be subsequently amended. The number of dwelling units must not exceed 10 per acre, except as further provided in Section 59-C-7.44(b)(3.).*

As stated by Technical Staff (Exhibit 53, p. 12):

This rezoning request restricted its residency to those aged 50-years and older. The dwelling units per acre are 2.57, meeting the density provisions of this requirement. The Applicant is providing 12.5 percent MDPU as required under Chapter 25(A).

It should also be noted that as a result of concerns expressed by the community at the hearing, a binding element was added to the Development Plan (Exhibit 94(a)), which provides:

Binding Element for Age Restriction:

Residency is restricted to permanent residents 50 years of age or over except: (a) a disabled relative may reside with a permanent resident; and (b) any person eligible for residency as described in Section 59-C-7.44 ("Age of residents, residential densities and MPDU"), or its successor, after the date of approval of this development plan.

The Hearing Examiner finds that Applicants' proposal meets the requirements of §59-C-7.44(a).

Section 59-C-7.45(b) provides the required setbacks for a development of less than 750 acres.

It specifies that:

*. . . all buildings and structures must be set back at least as follows:*

*(1) Not less than the setback of the adjacent zone.*

*(2) Additional setback must be provided from adjacent one family residential development if the building or structure proposed is higher than 35 feet. The additional setback must be a minimum of 2 feet for each foot of building above 35 feet.*

Technical Staff found that the proposed development more than complies with these setback requirements (Exhibit 53, p. 12):

The site is surrounded by the following Zoning Districts . . . :

North (and West): Country Inn Zone (75-feet from the Property line)

South: R-200 Zone (40-feet from the street)

East: RDT Zone (50-feet from the street)

West: RE-2 Zone (35-feet from the rear yard)

The proposed development exceeds the setbacks requirements of the adjacent zones and therefore, meets the setback requirements of the PRC Zone. The Applicant is not proposing to exceed a height of 35-feet for either the residential attached or detached units, or the clubhouse.

There is no evidence to the contrary, and the Hearing Examiner therefore finds that Applicants have complied with this provision.

Section 59-C-7.461 addresses building coverage limits, but it is inapplicable because it only pertains to developments of 750 acres or more.

Section 59-C-7.462(b) specifies that in a development of less than 750 acres, not less than 50 percent of the gross area must be devoted to green area. Technical Staff reports this project meets that standard, since it proposes more than 50 percent of the gross area devoted to green area. Exhibit 53, p. 13. The Hearing Examiner so finds.

Section 59-C-7.47(b) specifies that, in a development of less than 750 acres, no building except a church tower may exceed 100 feet in height. As stated by Technical Staff, this development meets this standard because “No buildings are proposed to be greater than 35-feet tall.” Ex. 53, p. 13.

Section 59-C-7.48 addresses roads, parking and school sites. Specifically, Subsection 59-C-7.481 specifies that off-street parking must be provided in accordance with the requirements of Zoning

Ordinance Article 59-E. Technical Staff found that “[t]he proposed Development Plan meets the off-street parking requirements of §59-E-3.7 (Schedule of Requirements) as it is providing at minimum, 2 parking spaces per one-family residences. The actual size of the clubhouse will be determined at site and preliminary plan stages, but the applicant[s] will provide the required number of spaces under §59-E-3.7.” Exhibit 53, p. 13. This evidence is undisputed, and the Hearing Examiner finds that Applicants are in compliance.

Subsection 59-C-7.482 provides that “Interior roads not dedicated to public use must have a minimum width of 22 feet for two-way traffic and 12 feet for one-way traffic and must be paved and maintained in good repair.” Technical Staff found (Exhibit 53, p. 13):

Although final road designations and design will occur at preliminary plan, the Applicant is proposing public, tertiary residential streets with, twenty feet of pavement and a five-foot sidewalk on one side.

Based on this evidence, the Hearing Examiner finds that Applicants are compliant with this section.

Subsection 59-C-7.483, which addresses dedication of land for school sites, is inapplicable because there will be no age-unrestricted section of the development.

Section 59-C-7.49 specifies procedures for the application and its review, and establishes a limitation on future reclassifications. Applicants have complied with this section by submitting a development plan in accordance with Zoning Ordinance §59-D-1, and if approved by the Council, this application will be reviewed by the Planning Board at site plan, in accordance with Zoning Ordinance §59-D-3. The final restriction in this section applies to any application for future reclassification of land already in the P-R-C Zone, so it is inapplicable to the instant application.

Based on this record, the Hearing Examiner finds that Applicants’ development plans are in accordance with all of the purposes, standards and regulations of the P-R-C Zone, as set forth in Article 59-C of the Zoning Ordinance.

**b. Safety, Convenience and Amenity of Residents**

The next part of “Finding (b)” required by Section 59-D-1.61 is a determination that the proposed development would provide the “maximum safety, convenience, and amenity of the residents.” The language of this section is ambiguous. If it means the “maximum” number of amenities in addition to the maximum safety of the residents, then the Hearing Examiner is at a loss to define the term “maximum . . . amenity,” since presumably more amenities could be added in any situation. It is undoubtedly true that Applicants in this case could have provided more on-site amenities, but it appears on the present record that they have at least met the current requirements specified in Technical Staff’s Recreation Guidelines. *See* Exhibits 93(a) and (b).

While the precise requirement for amenities is clearly a function of site plan review and not rezoning, this puzzling language in Zoning Ordinance §59-D-1.61(b) requires a Council finding relating to “amenit[ies].” The Hearing Examiner concludes that a reasonable interpretation of this section, in light of the P-R-C Zone’s requirement for a post-rezoning site plan review, is that the Council did not intend to count up the numbers of amenities at the rezoning stage, but rather to make a determination that given the intended use, the convenience and amenity of the residents would be sufficiently taken into account, in addition to providing for their safety. In other words, the modifier “maximum” was not intended to imply a requirement for the inclusion of every possible amenity.

As mentioned in the discussion of the P-R-C Zone’s purpose clause, the access to amenities and other services was discussed in Part III.D.1 (pp. 17-19) of this report. Applicants’ land planner, Gary Unterberg, testified that the proposed development plan would provide for the maximum safety, convenience, and amenity of the residents to the development. 1/14 Tr. 150-152. Technical Staff disagreed, but the Planning Board concluded “that the location of the site within a short drive of shopping centers and other amenities, with a community center on site and a park within walking

distance, satisfied the requirement in the purpose clause for adequate access to day-to-day and recreational services.” Exhibit 54, p. 1.

The safety issue was discussed in Part III.D.4.a of this report, at pages 41-46.

Based on this record and subject to site plan review, the Hearing Examiner finds that Applicants have provided for the maximum in safety, convenience and amenity for the future residents of this development.

**c. Compatibility with Adjacent Development**

The final required determination under “Finding (b)” is that the proposed development be compatible with adjacent development. The issue of compatibility was discussed in Part III. E of this report (pp. 58-62) in connection with community concerns.

Applicants’ land planner, Gary Unterberg, opined that the difference in density between the proposed development and the surrounding uses does not raise issues of compatibility for a number of reasons. First, this development would be a like use to the surrounding area – single-family, detached homes. Secondly, it would exceed the space (*i.e.*, minimum tract area) requirements of the P-R-C zone. In addition, the RE-2 zone adjacent to the subject site has a building coverage maximum of 25 percent, and the actual building coverage on the proposed development will be similar. Even though the P-R-C Zone does not prescribe a maximum building coverage for a site this size, this project will have a building coverage of less than 25 percent because a binding element restricts the impervious area to 28 percent, and that includes the roads. Moreover, Applicants are proposing a maximum height of 35 feet, while the maximum height for the RE-2 Zone is 50 feet. The proposed development will also exceed the required setbacks on the west by an average of three times, and with at least 70-foot setbacks on the east, the project will far exceed the front setback of 50 feet required from the RDT Zone. Finally, Ridge Road is up high, and there will be a slope that will vary five to ten feet,



depending on the final grade. The homes in this development will be set down lower than Ridge Road. Because of the setback and the grading, they will be less noticeable to Ridge Road than the existing homes. Based on all these factors, Mr. Unterberg concluded that the planned project will be compatible with the surrounding area. 1/14 Tr. 156-158.

In addition, ample screening is planned for the site to aid in compatibility, especially to the north, the west and the south, as shown on pages 21-23 of this report. Moreover, a note has been added to the final development plan, by which Applicants agree to plant screening trees in the area adjacent to the proposed extended-detention (dry) ponds to the extent that governmental agencies allow reduction in the size of these stormwater management facilities, or even to add screening trees to the adjacent lots if no space is available next to the dry ponds on the subject site.

As to compatibility, Technical Staff found that the proposed use is similar in nature to all the uses surround the site, in that all are residential. However, Staff felt that the proposed density exceeded that which was recommended in the Master Plan, thereby reducing compatibility. Exhibit 53, p. 15. On the other hand, the Planning Board found the opposite: “The Development Plan provides a low density transition which, coupled with the forest buffers and setbacks, provides compatibility with the surrounding community.” Exhibit 54, p. 2.

The Hearing Examiner agrees with the Planning Board. Given the similar uses, the large setbacks, the extensive screening which is planned, the afforestation required by the approved Preliminary Forest Conservation Plan, and the other factors mentioned above, the Hearing Examiner finds that the proposed development will be compatible with adjacent development.

### **3. Internal Vehicular and Pedestrian Circulation Systems and Site Access**

The third required finding is:

*That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.*

The issue of site access and circulation was discussed in Parts III.D.4.a of this report (pp. 41-46). As noted, Applicants' transportation planner, Wes Guckert, testified that the proposed circulation systems for pedestrians, vehicles, and bicycles will be safe, adequate and efficient. 1/18 Tr. 33.

Technical Staff agreed that "...vehicular and pedestrian circulation will be adequate for the development proposed under this proposal." Exhibit 53, p. 7. Later in its report, Staff added, "This proposal provides a safe, adequate pedestrian circulation system connecting external and internal sidewalks that move the residents safely through the neighborhood and to the proposed clubhouse recreation center." Exhibit 53, p. 15. Staff also stated, "The internal and external vehicular circulation patterns are safe, adequate and efficient." Exhibit 53, p. 16. There is no contradictory expert evidence in the record.

Although all of the transportation issues will be analyzed in more detail at site plan and subdivision reviews, the Hearing Examiner finds, based on the current record, that the proposed internal vehicular and pedestrian circulation systems and points of external access will be safe, adequate and efficient for both vehicular and pedestrian traffic.

#### **4. Preventing Erosion, Preserving Vegetation, Forest Conservation and Water Resources**

The fourth required finding is:

*That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.*

As discussed in Part III.D.5 of this report (pp. 50-56), the site is located within the Clarksburg Special Protection Area (SPA), and there are no streams, floodplains or wetlands on the property.

Exhibit 53, p. 8. On January 16, 2013, the Planning Board approved both a Preliminary Forest Conservation Plan (Exhibit 89(a)) and a Preliminary Water Quality Plan (Exhibit 89(b)).

The afforestation areas, as provided for in Applicants' approved Preliminary Forest Conservation Plan (PFCP -Exhibit 41(c)), are depicted on page 22 of this report. No forest will be cleared; 0.21 acres of forest will be retained; and there will be 7.2 acres of afforestation, which is about 35 times the amount of existing forest on site. These areas will be protected in perpetuity through a Category One Conservation Easement.

Development Plan Binding Element #3 limits the impervious area of the development to 28 percent of the net area of 49.4 acres. Exhibit 94(a). Technical Staff indicates that this limitation is consistent with the Department of Permitting Services' (DPS's) Stormwater Management Design Computations. Exhibit 53, p. 8. Applicants' civil engineer, Frank Bossong, testified that Applicants will meet all of the environmental site design requirements for stormwater management, both for the State and the County. 1/18 Tr. 98-101.

Technical Staff concluded that "The site is in compliance with the requirements of Chapter 22A, Forest Conservation, and Chapter 19, Water Quality. . . . The Property by its nature is relatively flat and does not contain any excessive steep slopes that would otherwise cause concern for erosion or require unreasonable grading to allow development. . . ." Exhibit 53, p. 16.

Based on this record, the Hearing Examiner finds that forest conservation, stormwater management and erosion controls are all consistent with State and County requirements.

Mr. Bossong testified that even if both the dry ponds on the west were made smaller, so as to allow for a greater amount of screening in those areas, Applicants could still meet all of the environmental site design requirements. 1/18 Tr. 98-101. Given this testimony, the Hearing Examiner recommends that the Council, in a resolution approving the rezoning and the development plan, note

that it is not precluding a reduction in the size of the retention ponds to allow further screening on the west, should the Planning Board determine that is advisable at Site Plan and Subdivision reviews.

## **5. Ownership and Perpetual Maintenance**

The fifth required finding is:

*That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.*

Applicants Theodore H. Butz, et al. are the owners of the subject site. Exhibit 70.<sup>16</sup> They have submitted a “Declaration of Covenants, Conditions and Restrictions for Orchard Run Homeowners’ Association, Inc.,”<sup>17</sup> which provides for the maintenance of any areas intended to be used for recreational or other common or quasi-public purposes. Exhibit 96(a), an amended version of Exhibit 13(c). Applicant Thompson Butz testified that these homeowners’ association documents show the method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes. 1/14 Tr. 38-39. In addition, Elm Street Development has extended an invitation to Applicants to join Clarksburg Village’s homeowners’ association if the rezoning is approved. 1/14 Tr. 254.

The Hearing Examiner finds that Applicants have sufficiently demonstrated both ownership of the property and their commitment to perpetual maintenance of all recreational and other common or quasi-public areas.

## **6. The Public Interest**

The Applicants must show that the proposed rezoning is sufficiently in the public interest to justify its approval. When evaluating the public interest, the District Council normally considers

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<sup>16</sup> See footnote 1 on page 4 of this report.

<sup>17</sup> “Orchard Run” was the name first used to describe this project when the application was initially filed. It is now being called the “Courts at Clarksburg” by Applicants.

Master Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities or the environment and public benefits such as provision of MPDUs.

The issue of Master Plan conformance was considered in Part III.D.3. of this report, at pages 32-41, and summarized in Part IV.B.1.a at pages 65-66. As explained at length in this report, Technical Staff recommended denial of this application (Exhibit 53), but the Planning Board supported the proposed rezoning by a unanimous vote (Exhibit 54). The Hearing Examiner found the Planning Board's interpretation of its Clarksburg Master Plan to be more persuasive than Technical Staff's interpretation, and more likely to produce a result in the public interest.

The impact on public facilities was discussed in Part III. D.4. of this report. The evidence indicates that transportation, schools and water and sewer services would not be adversely affected by the proposed development. Report pages 41-50.

Moreover, as discussed in Part III. D.5. of this report, the proposed development would not have an adverse effect on the environment. On the contrary, significant afforestation will be made on the site; the proposed stormwater management system will result in less stormwater flowing off the property than today; the elimination of farming on the site will reduce nitrogen runoff into the Chesapeake Bay; and the proposed connection to the public sewer system would further reduce the level of contaminants flowing into the Bay. Report pages 50-56.

In addition, as discussed in Part III.D.1 of this report, the public would clearly be served by the provision of additional housing for seniors, which this record demonstrates is needed in the County. Report pages 20-21. The proposal will also provide 18 MPDUs on site, which will add to the County's stock of affordable housing.

For the reasons discussed at length in this report, the Hearing Examiner concludes that the proposed development would be in the public interest.



### C. Conclusion

Based on the foregoing analysis, and after a thorough review of the entire record, I reach the following conclusions:

1. The proposed development satisfies the intent, purpose and standards of the P-R-C Zone (provided that the Council also approves public sewer service for the property without a PIF restriction), and meets the requirements set forth in Section 59-D-1.61 of the Zoning Ordinance;
2. The application proposes a development that would be compatible with development in the surrounding area; and
3. The requested reclassification to the P-R-C Zone has been shown to be in the public interest.

### V. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-881, requesting reclassification from the RE-2 Zone to the P-R-C Zone of approximately 54.34909 acres of land described as Parcel P429 on Maryland Tax Map FV 122 (a/k/a, the “Butz Property” or the “Water Tank Farm Property”), and located at 21901 Ridge Road, Germantown, Maryland, in the 2<sup>nd</sup> Election District, be approved in the amount requested and subject to the specifications and requirements of the revised Development Plan, Exhibit 94(a), provided that the Council also approves public sewer service category S-3 for the property without a PIF restriction and that Applicants submit to the Hearing Examiner for certification a reproducible original and three copies of the Development Plan approved by the District Council within 10 days of approval, as required under Code §59-D-1.64.

Dated: March 19, 2013

Respectfully submitted,



Martin L. Grossman  
Hearing Examiner

## **APPENDIX – SUMMARY OF THE HEARING**

The public hearing was held, as scheduled, on January 14 and 18, 2013.<sup>18</sup> Seven witnesses were called by the Applicant – Thompson Butz, property owner; Gary Unterberg, land use planner; Jennifer Russel, Master Plan expert; Katherine Kubit, Vice President of Elm Street Development; Wes Guckert, transportation planner; Dusty Rood, environmental scientist; and Frank Bossong, civil engineer. Opposition testimony was provided by Mary Jane Goodrick and Robert Goldberg, on behalf of the Greater Goshen Civic Association (GGCA), as well as by neighbors Ron Wills and William Hancock, both of whom live in the adjacent Brink Meadows subdivision. The record was held open until February 5, 2013, to allow the Applicants the opportunity to file minor revisions to the development plan, and to give Technical Staff and the neighbors time to review and comment by February 4, 2013. 1/18 Tr. 161-163, 187.

The opposition was also permitted to supplement the record during this period with evidence of other comparable senior facilities in the County. 1/18 Tr. 182-185.

### **A. Applicants' Witnesses**

#### **1. Thompson Butz (1/14 Tr. 16-67):**

Thompson Butz testified that he is one of four owners of the subject site. The others are Theodore Butz, Robert Butz, and Jeremy Butz. Windridge Farm, LLC, is not an applicant here and is not an owner. He stated that the area used to be all agricultural, but that is clearly not the case now. The area is dominated by thousands of rooftops, traffic, and retail that are the hallmarks of a growing and evolving area. His property is the last traditional row crop farming in the area, and “the area’s growth has made traditional commodity farming operations no longer viable.” 1/14 Tr. 16-18. [The

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<sup>18</sup> The January 14 transcript is cited as 1/14 Tr. xx, and the January 18 transcript is cited as 1/18 Tr. xx.

Hearing Examiner advised Mr. Butz that his business concerns are not an issue that the Hearing Examiner can consider. 1/14 Tr. 19]

With regard to opposition points about the pastoral view, Mr. Butz testified that his property is not zoned agriculture. It is a residential zone, and it is not abutting any agricultural property. The property across the street to the east has the two large water towers, and is on WSSC property. The RTD land across the street to the north of the WSSC property has been sold to the Catholic church and is now going to be used as a cemetery. [According to Mr. Kline, the cemetery exists by special exception granted by the County Council.] 1/14 Tr. 20-23.

Mr. Butz further testified that he was contacted about 11 years ago by Elm Street Development, the developer who is responsible for the construction and widening of Route 27, the construction of A-305, and is the lead developer in Clarksburg Village. Clarksburg Village is north and northwest of the property. A-305 is a four-lane divided arterial road, which will bisect the property and connect to Route 27, which is being widened to six lanes from I-270 to the intersection of A-305 and Route 27. After that intersection, it starts to narrow down as Route 27 heads north. 1/14 Tr. 24-25.

Mr. Butz observed that his property is less than a mile from Milestone Shopping Center, where there are major retail activities and a mile from I-270, where there is “tremendous transportation infrastructure.” In his opinion, two-acre single-family homes with well and septic construction do not make sense in such an area. “It simply is not smart growth.” He therefore considered more appropriate land use options, and given the aging baby boomer population, and the need in the County, the P-R-C Zone started to make a lot of sense. 1/14 Tr. 27-28.

Mr. Butz then quoted from page 9 of the 1994 Clarksburg Master Plan, stating a goal to “Encourage and maintain a wide choice of housing types and neighborhoods for people of all

incomes, ages, lifestyles, and physical capabilities at appropriate densities and locations.” He noted that the Clarksburg Master Plan has no PRC Zones in it because when the Plan was adopted, the PRC zone was limited to properties of 750 acres or greater. 1/14 Tr. 29. He added that the need for senior housing in the County was recognized by the May 2011, Housing Element of the General Plan, contained in Exhibit 34(b). The Housing Element of the General Plan also states that higher densities and smaller units are preferable. 1/14 Tr. 30.

Mr. Butz further testified that this development will be part of the Greater Clarksburg Village, in accordance with an agreement with Elm Street Development (Exhibit 60), the details of which have not been worked out. That is important because it allows the residents of this community access to the amenities of Clarksburg Village, the trails and other aspects in Clarksburg Village, and adds a new housing style for Clarksburg Village. 1/14 Tr. 36.

Mr. Butz indicated that the homeowners association documents (Exhibit 13(c)) in the file show the method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes. 1/14 Tr. 38-39.

Mr. Butz also referenced various documents (SR-5 and SR-7) in Exhibit 34(b) and an American University article titled, “Montgomery County’s Aging Population is Growing Rapidly,” dated June 2nd, 2011 (Exhibit 61) to support his argument that this type of senior housing was needed in the county. He concluded that there is substantial statistical data to support a need in this area for a planned retirement community, and there is a demand for this type of housing within the I-270 corridor. He added that two-acre residential million dollar homes on a six lane arterial road, on a property that is bisected by a four lane arterial road, did not impress Applicants as smart land use. 1/14 Tr. 40-51.

Mr. Butz further testified that, at the end of 2012, the County Council voted to place the property in a tier two category pursuant to the Sustainable Growth And Agricultural Preservation Act. In a tier two category, septic use is prohibited. The property is now recommended for water and sewer connection. 1/14 Tr. 51. He stated that the proposed development will create a lifestyle

for active adults, and will enable them to take advantage of the amenities of Clarksburg Village, the amenities within Milestone, and the amenities within Germantown Town Center, where there is everything from performing art centers to libraries, medical, three or four grocery stores and book stores. Milestone is a short walk or bike ride from the property. Right across Brink Road from this property is the Ridge Road Recreational Park, which has tennis courts, ball fields and dog walks. Milestone has the Suburban Fitness Center, which is a gym that offers therapeutic services. The new Wegmans is going to be at Milestone. There's a Home Depot, a Borders, a Wal-Mart, a Best Buy, an AT&T store and three or four restaurants. 1/14 Tr. 52-54.

Mr. Butz stated his opinion that it is in the public interest to provide this housing type to this under-served segment of the Montgomery County population, that have expressed a desire for this type of product, and to live in this area, and want to stay in Montgomery County. 1/14 Tr. 55. On site amenities will include walking and biking trails and a community center, which will provide "flex space." 1/14 Tr. 58-59.

On cross-examination, Mr. Butz testified that crosswalks would be provided for residents to cross the local roads to access off-site amenities. 1/14 Tr. 60-61. According to Mr. Butz, there has been no planned retirement community approved since the 1960s, and that was Leisure World. 1/14 Tr. 63.

2. Gary Unterberg (1/14 Tr. 68-196, 248; 1/18 Tr. 131-170):

Gary Unterberg testified as an expert in land use planning. Mr. Unterberg described the area around the subject site. The area to the south of Brink Road is in the Germantown Master Plan planning area. The properties are generally residential, southwest and to the south. The zoning is predominantly R-200 TDR, and the densities range from five to seven units per acre. 1/14 Tr. 73.



Approximately a half mile from the Brink Road boundary to the south is the Milestone Shopping Center. From Brink Road to the corner of Milestone is a half mile. These distances are shown by circles on a Exhibit 34(l). The first one, a blue circle, is a five-minute walk, which is one-quarter mile, and that's measured from the center of the site. The second blue circle is a 10-minute walk, which is a half mile. The third circle, which is an orange color, is a five-minute bike ride, or three-quarters of a mile. The last circle is orange and is the largest one; it is a 10-minute bike ride, and that is one and a half miles. Recreational areas are also noted on the exhibit. 1/14 Tr. 73-75.

In the Master Plan, the subject site, which is west of Ridge Road (Rt. 27) and north of Brink Road, is in Brink Road Transition Area neighborhood. There are residential areas to the west and residential areas to the north. Page 40 of the Master Plan recommends a maximum of 1,000 dwelling units in the Brink Road Transition Area neighborhood. The neighborhood is developed, primarily, except for the subject site. Mr. Unterberg noted that adding the 140 proposed units for the site to the existing homes in the Brink Road neighborhood, the total is 969 units, which is less than the 1,000 units on page 40 of the Master Plan. There is an existing gas easement that bisects the southern portion of the property. It is the Atlantic Seaboard right-of-way for liquid gas transmission that goes through the County. 1/14 Tr. 76-79.

Mr. Unterberg described the subject property as "open" and "generally rolling." 1/14 Tr. 79. The slopes are four to five percent. There are some flat areas, some steeper areas. In general, Ridge Road is true to its name; it is a ridge line. The property falls from Ridge Road, which is the high point or the high line. It falls to the west. There are several ridges and several drainage ways that traverse through the property. In the upper or northern, western corner of the property, the only forest on the site is noted. It is just under half an acre, and part of that forest will be impacted by A-305, the Master Plan road that comes through the site. 1/14 Tr. 79-80.

The site is in a special protection area. The Planning Board, on December 20, 2012, approved the preliminary water quality plan, which is also the stormwater management concept. 1/14 Tr. 79-80. Exhibit No. 62 is the Planning Board resolution of January 8, 2013, approving Applicants' water quality plan. Exhibit No. 63 is the January 8, 2013, resolution of the Planning Board approving Applicants' forest conservation plan. Exhibit 41(c) is a copy of the preliminary forest conservation plan that was approved by the Planning Board. It primarily shows reforestation to the north, to the west, and then also on the corner of Brink Road and Route 27. 1/14 Tr. 80-84.

According to Mr. Unterberg, the concern raised by the Clarksburg Civic Association (Exhibit 51) about a possible restriction to accessing Route 27 has nothing to do with the proposed development, but rather is off-site and it involves property to the north of the application area. 1/14 Tr. 86-91.

Mr. Unterberg offered Exhibits 34(n), an aerial photo, and 34(o), a surrounding area map, to demonstrate the surrounding area as Applicants would define it. When the Hearing Examiner asked why Applicants' proposed surrounding area excluded the area directly across from the site and to its northeast, Mr. Unterberg explained that that area was outside of the Clarksburg planning area. He also noted that it was zoned RDT and was not likely to be changed to a residential zone. Since it is part of a confronting property directly across the highway from the site and also includes some residential areas northeast of the site that may be affected by the development, the Hearing Examiner ruled that an amended Surrounding Area map be entered in the record as Exhibit 64 and an amended aerial photo of amended surrounding area be entered as Exhibit 65 showing the enlarged surrounding area including locations east of Ridge Road. 1/14 Tr. 96-104.

Mr. Unterberg further testified that the reforested areas being added to the site will provide screening for the adjacent areas. Applicants also included binding element number three, which

specifies that the impervious area is to be up to 28 percent, based on net acreage of 49.4 acres. 1/14 Tr. 106-107.

[There was a discussion of adding an additional binding element which would restrict residency to those 50 and older, except to the extent the requirement is varied by the P-R-C Zone's language. 1/14 Tr. 108-122.]

Mr. Unterberg further discussed the binding elements proposed by Applicants, noting that Area A, which is approximately the three-quarters of the site that is south of A-305, consists of approximately 38.9 acres. Building heights will be limited to 35 feet. Applicants propose a range of 100 to 130 single-family units for Area A, and associated parking of two spaces per unit. There will be a community center, located in the northern third of Area A. It is currently shown as a building with 1,400 square feet of space (35 feet by 40 feet), but its final size will be determined at Site Plan. Area B, which is the part of the site that's north of A-305, will be approximately 10 and a half acres, with 25 to 35 units, also limited to a maximum height of 35 feet, and the associated parking. There is thus a net acreage of 49.4 acres, from the approximate total of 54.4 acres. Approximately five acres includes the dedication for A-305, the master plan road. It will be a 120-foot right-of-way, four lanes, which provide one access point for a road to go north into Area B, and the same intersection of the road to go south into Area A. The dedication also provides for the widening of Route 27, the length of the property, all the way down to Brink Road. 1/14 Tr. 122-124.

Using Exhibit 34(k), which shows walkways, bikeways and streets, Mr. Unterberg discussed the internal roads and the access points, sidewalks and bike paths. A-305 is a public road, with a proposed signalized intersection at Ridge Road. Intersecting A-305 are one road to Area B, to the north, and a series of roads that go south through Area A. Additional vehicular access is off of Brink Road. Applicants also plan to link an existing pedestrian trail with the Ridge Road Regional Park, by

placing a crosswalk across Brink Road at the vehicular access point. A dedicated bike trail will be built along A-305, and then south along Ridge Road, through the signalized intersection and a crosswalk at the intersection of Brink and Ridge Roads. 1/14 Tr. 124-125.

Mr. Unterberg further testified regarding on-site and adjacent recreational facilities in the Ridge Road Regional Park. On site facilities include a pedestrian system, a bike system, a community center and a community garden. He feels Applicants can provide more than adequate recreation on site, per the County standards, that will be locked in at site plan. [The exhibit he used to support these calculations (Exhibit 66) was later superseded by Exhibits 93(a), (b) and (c).] Applicants have the option to join the overall larger Clarksburg Village, and then share in the use of their recreation amenities. Currently, Applicants intend to have a separate stand-alone HOA for the subject site for overall maintenance, and for items specific to the 140 age-restricted units. 1/14 Tr. 125-132.

As to the type of dwelling units planned for the project, Mr. Unterberg stated that depending on the market, Applicants provided the option to do up to 20 percent, *i.e.*, 28 units as attached units [Applicants subsequently modified that option to allow up to 15 percent (*i.e.*, 21 units) as attached units.] Right now, Applicants' intent is to do all single-family detached units. 1/14 Tr. 133.

Mr. Unterberg opined that the proposed development would provide adequate medical, retail, commercial and similar services to serve the residents of the community, in accordance with the purpose clause of the P-R-C Zone. 1/14 Tr. 134-136. He also feels that the design of the project will complement the Germantown Greenway and will serve as a gateway to Clarksburg as you travel north on Route 27, in accordance with the Master Plan. He noted the two acres of planned reforestation and the green edge that would be created, as demonstrated in Site sections, Exhibits 40(a) and (b). Mr. Unterberg added that the project would be consistent with the Master Plan's 1,000 unit cap in the Brink Road Transitional Area (p. 40 of the Master Plan) and its residential density recommendation of

two to four units per acre (p. 75 of the Master Plan). Building 140 residential units on the 54 acres would result in a density of just under 2.6 units per acre. 1/14 Tr. 136-139.

Mr. Unterberg described how Applicants would minimize the grading to protect where possible existing vegetation on site. 1/14 Tr. 139-140. Mr. Unterberg also clarified the road names in the Clarksburg Master Plan. A-305 is a four-lane road. At Ridge Road, it changes to M-83, and all the M-83 studies start at MD 27 (Ridge Road) and then continue east and south. Thus, the whole M-83 study does not include any of A-305, which is everything west of Ridge Road, Route 27. 1/14 Tr. 145.

Mr. Unterberg further testified that the proposed development would meet or better all the development standards of the zone. 1/14 Tr. 145-150. He also opined that the proposed development plan substantially complies with the use and density indicated in the master plan or sector plan, does not conflict with the general plan; would provide for the maximum safety, convenience, and amenity of the residents to the development; and would be compatible with adjacent development. On this last point, Mr. Unterberg noted that the P-R-C zone provides setbacks for compatibility based on the adjacent zone. This project exceeds those on all four sides of the subject property, particularly as to the western edge requirement of a 35-foot setback, which is the rear yard setback for the RE-2 Zone. This development will exceed that, on average, up to three times the 35-foot requirement. There also is a stormwater management facility that will be landscaped. Starting north of the gas easement, there will be a reforestation buffer that will be placed in a category one forest conservation easement, and the detailed planting for that will be at site plan. 1/14 Tr. 150-152.

Mr. Unterberg described the two stormwater “ponds” planned for the site, one on the northwestern side of Area A and the other on the southwestern corner of Area A. These will be dry facilities and will be landscaped. There is an existing hedgerow, and the dry ponds will be primarily lawn area. When there is a storm event, they will fill up with water. 1/14 Tr. 152-155.

Mr. Unterberg opined that the difference in density between the proposed development and the surrounding uses does not raise issues of compatibility for a number of reasons. First, this development would be a like use with single-family detached homes. Secondly, it would exceed the space [*i.e.*, minimum tract area] requirements of the P-R-C zone. In addition, the RE-2 zone has a building coverage maximum of 25 percent. This project will have a building coverage, even though there is not a P-R-C requirement, of less than 25 percent because a binding element restricts the impervious area to 28 percent, and that includes the roads. Another point on compatibility in relation to the RE-2 zone is that Applicants are proposing a maximum height of 35 feet, while the maximum height for RE-2 Zone is 50 feet. In addition to exceeding the required setbacks on the west by an average of three times, the project, with at least 70-foot setbacks on the east, will far exceed the front setback of 50 feet required from the RDT Zone to the east. Finally, Ridge Road is up high, and there will be a slope that will vary possibly five to 10 feet, depending on the final grade. The homes in this development will be set down lower than Ridge Road. Because of the setback and the grading, they will be less noticeable to Ridge Road than the existing homes. Based on all these factors, Mr. Unterberg concluded that the planned project will be compatible. 1/14 Tr. 156-158.

The Hearing Examiner asked Mr. Unterberg to address Technical Staff's statement in Attachment 8 (p. 3) to the technical staff report, that "The proposed age-restricted housing in the PRC zone at a density of 2.576 units per acre is 2.5 times the upper range of the rural residential density proposed in the master plan for the subject site. It also has a significantly higher density than the adjacent parcels. With respect to density, this application does not provide an appropriate east-west transition between the specifically designated adjacent land areas." 1/14 Tr. 158-159.

Mr. Unterberg replied there is a discrepancy between what the Master Plan map shows, which reflects the existing RE-2 zoning and that density, versus what the Master Plan text, on pages 40 and 75 of the Master Plan, that suggests that the neighborhood with the single-family dwellings should be



two to four units per acre. Thus, there is a discrepancy within the Master Plan regarding density. He stated that the Planning Board found that the project would be compatible based on the gateway and the green edge, particularly on MD 27, that allows the development to provide transition by not having units right up on the road. Thus, Applicants are in substantial compliance with the Master Plan, based on those factors. In effect, Technical Staff's reliance on the map, rather than the text, misrepresented the intent of the Master Plan. In his opinion, considering setbacks, screening and other factors mentioned, the density is compatible with surrounding densities and consistent with the Master Plan. 1/14 Tr. 159-160.

Mr. Unterberg concluded that the proposal set forth in G-881 is in substantial conformance with the Master Plan and the intended purposes of the Master Plan, complies with all the dimensional and regulatory standards for the P-R-C zone and its purpose clause, will be compatible with surrounding land uses, and will be in the public interest. 1/14 Tr. 161-162.

On cross-examination by Ms. Goodrick, Mr. Unterberg admitted that some of the facilities (the football/soccer fields) on his list of nearby recreational facilities (Exhibit 66) [Applicants later substituted Exhibits 93(a) and (b).] do not yet exist because Seneca Crossing Park is still in the developmental stage. 1/14 Tr. 170-174. He also noted that water lines are currently available on Ridge Road and Brink Road, but that sewer lines would have to be added to connect to the lines in Clarksburg Village. 1/14 Tr. 175.

In response to a cross-examination question by Mr. Wills, Mr. Unterberg replied that page 75 of the Master Plan calls for a density range of two to four units per acre. Applicants are currently requesting 2.6 units per acre, so one could push for more density. Originally, more density was proposed, but working with the Technical Staff of Park and Planning and given the environmental factors, including the impervious cap, Applicants reduced the density. Potentially, PD zones that allow higher densities could have been sought. 1/14 Tr. 176-177.

Mr. Unterberg explained the possible configuration of the planned community center: two smaller rooms, 10 by 10, that's 100 square feet each. A larger room, 30 by 30, amounts to 900 square feet, and 900 plus 200, amounts to 1,100, which leaves another 300 square feet for hallways. Something like that is realistic, which would be one large community room, and then two smaller rooms. 1/14 Tr. 180.

When questioned about how the trail would connect with the park across Brink Road, Mr. Unterberg stated that "We're anticipating that we want to connect to that trail . . . with the improvements to Brink Road, [and] we need to make that connection to that trail so it works." The site distance on Brink Road and the crosswalk will all need to work. 1/14 Tr. 181.

Regarding possible noise from the development, Mr. Unterberg testified that the noise from these single-family residential homes aren't going to be dissimilar from the noise from the existing single-family homes either in the RE-2 or the R-200 zones west and north of the site, but typically a senior community would be quieter than a community that is full of children, and with the type of outdoor activities common for younger residents. 1/14 Tr. 187.

With regard to other concerns raised by the opposition, Mr. Unterberg testified that there would likely be less dust than produced by a farm that is being tilled, spring and fall. When they do plant or harvest, they make a lot of dust. Once the site is developed, it basically will be stabilized. As to the loss of pastoral scenery, Mr. Unterberg noted that the site is currently zoned residential, so if it were developed residential, there would still be houses there. As to light pollution, County regulations require that Applicants capture any light on-site with cutoff fixtures so it doesn't overlap onto the surrounding properties. That would be detailed out at site plan. 1/14 Tr. 188-189. In Mr. Unterberg's opinion, there would be no obligation by the Applicants to mitigate the effect of noise from additional traffic on surrounding houses (*i.e.*, outside the development). 1/14 Tr. 195.

Mr. Unterberg further testified that the road plans for A-305, which include the portion that goes through the subject property and the widening for Route 27, are the responsibility of Clarksburg Village. They have plans pending that are going through final engineering approval, that include those bikeways. The bikeways that would be along MD 27 and then go up A-305 to the north and west are included in that approval package and are required for their approval. 1/14 Tr. 248.

Mr. Unterberg identified various photographs submitted by Applicants and those in the Technical Staff report. 1/18 Tr. 131-135. He also addressed historic preservation issues raised in a September 17, 2009 memorandum by Scott Whipple of Technical Staff regarding the nearby Howes Farm (#13/19), also known as the Yegher Country Inn (Exhibit 53, Attachment 1). The certified zoning vicinity map (Exhibits 7 and 34(f)) shows the subject site in yellow, with the Yegher property darkly shaded. It is in the Country Inn Zone, and the historic house sits in the upper northwest corner. There is an existing entrance road that comes off of Ridge Road and travels back to the house.

In Mr. Unterberg's opinion, Mr. Whipple's letter is incomplete because it fails to mention or show A-305, Snowden Farm Parkway, west of Ridge Road, even though it is a Master Plan road, and A-305, will travel through the subject site and through the Yegher property. This fact is noted in Technical Staff's December 6, 2010 memorandum to the Planning Board entitled "Mandatory Referral No. MR2010814" (Exhibit 34(b), Item R-2). The Planning Board approved the extension of Snowden Farm Parkway, A-305, west of Ridge Road, MD 27. In so doing, the memorandum considered the impact on the Howes Farm historic resource and the required modification of its access driveway. The boundaries of the environmental setting have effectively been reduced to the house itself. The closest house, which is in the Green Ridge Acres neighborhood, is approximately 400 feet from the historic house. The closest house in the proposed development will be over 800 feet from the historic resource. In sum, the observations by Mr. Whipple are no longer applicable because the historic setting was subsequently cut back to just include the Yegher house as a result of the A-305

approval. In Mr. Unterberg's opinion, the proposed development will not adversely affect the historic resource. 1/18 Tr. 136-145.

Mr. Unterberg introduced two revised lists of on-site and nearby recreational facilities (Exhibits 93(a) and (b)), calculating numerical values under two assumptions, the first is that the residents would be classified as "seniors" (65+) under Planning Board's Recreational Guidelines (Exhibit 93(a)), and the second is that they would be classified as "Adults" (18-64) under those Guidelines (Exhibit 93(b)). The residents in this development would be aged 50 and over, so they don't fit precisely into either category. In both cases, Applicants also used more conservative assumptions, eliminating a natural trail from the count and reducing the claimed score for the community center. Nevertheless, under either assumption, the supply of recreational facilities would still exceed the demand as determined by the Recreational Guidelines. 1/18 Tr. 146-153.

Mr. Unterberg also announced that Applicants would revise their Development Plan to reduce the possible percentage of attached units to change the percentage of potential attached units from 20 to 15 percent, which would be a maximum of 21 attached units, still not exceeding 140 units in total. Applicants would add an appropriate definition for attached residential, commonly referred to as a "villa" – a two-story structure containing a first floor master bedroom. 1/18 Tr. 158.

3. Jennifer Russel (1/14 Tr. 197-250):

Jennifer Russel testified as an expert in master planning, a subcategory of land use planning. She stated that she was "the first Clarksburg ombudsman." She was appointed by then County Executive Doug Duncan in 2006 to act as a conduit between the development community and the citizens of Clarksburg. 1/14 Tr. 198. Ms. Russel introduced four portions of the 1994 Clarksburg Master Plan as exhibits to highlight them—Exhibit No. 67(a) is pp. 75-77 of the Plan; Exhibit No. 67(b) is p. 97; Exhibit No. 67(c) is p. 40; and Exhibit No. 67(d) is p. 39. 1/14 Tr. 204-207.

Ms. Russel quoted from p. 75, which discusses the Brink Road Transition Area, “To further reinforce the transition from Germantown . . . to Clarksburg . . ., this Plan proposes the entry to Clarksburg be characterized by low density residential development (two to four units per acre).” She stated that the subject property is clearly the entry point to Clarksburg, as it transitions from neighboring Germantown. Page 77 of the Master Plan includes a land use plan called the “Brink Road Transition Area Land Use Plan,” and the language in that land use plan that is in conflict with the language quoted above because it designates the property in a much lower density range – rural residential (a range of one d.u. per acre one d.u. per five acres). The Hearing Examiner marked the subject site location on the map on pages 77 and 97 of the Plan.

Ms. Russel noted that page 97 (Exhibit No. 67(b)) of the Master Plan has a Zoning Plan that shows the property as RE-2 (*i.e.*, 0.5 d.u. per acre). Ms. Russel opined that she feels very strongly that this parcel is at the entry to Clarksburg, and that the text language that characterizes it as low density residential, two to four units per acre, should prevail. 1/14 Tr. 208. She noted that on page 75, in the first paragraph, it alludes to the fact that there’s an absence of sewer in this general area. It is Ms. Russel’s opinion that the mistaken understanding in 1994 that the site could not be sewerred held the parcel captive to the lower density. 1/14 Tr. 209.

Ms. Russel further testified that the Brink Road Transition Area, as shown in Exhibit 34(q) and as described on page 75 of the Plan, “forms a visual buffer between Germantown and Clarksburg . . .” She feels that Applicants’ development plan subtly shifts density to the north and creates a very robust green belt and an entryway into the Clarksburg planning area, which is demarked by Route 27. In fact, the monumental entrance for Clarksburg Village is going to be situated at the intersection of Route 27 and A-305. 1/14 Tr. 210-211.

Ms. Russel referred to the illustrative sections in Exhibit 40(a) to support the argument that Applicants’ development plan will help reinforce each community’s specific identity. The Planning

Board also recognized that the development plan Applicants are proposing achieves the transition. The Planning Board found, “That the development plan provides a low density transition, which coupled with the forest buffers and setbacks, which have been enumerated, provides compatibility with the surrounding community.” Ms. Russel also pointed out that the Master Plan is 18 years old. 1/14 Tr. 214.

She noted that it also has an objective within the planning area to provide a wide variety of housing types. Also, on page 40 of the Master Plan (Exhibit 67(c)), the Plan specifies the maximum end-state development for each sub area of the Plan. Under that density guidance, the Brink Road Transition Area is anticipated to develop with up to 1,000 dwelling units in its 860 acres. With the addition of the 140 units for Applicants’ Courts at Clarksburg, the planning area still only incorporates 969 units, well below the stated cap. She stated that the Brink Road area is very much built out already, so under the Master Plan, after this development, it is unlikely to have any more dwelling units in this area. 1/14 Tr. 216-217.

Ms. Russel noted that at the time of the Master Plan’s adoption, which was 1994, 18 years ago, the property was not and could not have been considered for the P-R-C zone because the zone at the time was applicable only to parcels in excess of 750 acres or more. She added that Applicants are trying to provide non-vertical, age-restricted housing of a single-family nature in the up-county area, where there is nothing of that sort. Moreover, this is in a County where the demographic data shows an increasing number of residents entering the 50 and older age group. She concluded that those are the kinds of current public policy needs that simply couldn’t have been addressed or reflected in a recommendation of the 18-year-old Master Plan. 1/14 Tr. 218-220.

Ms. Russel then discussed two studies relating to housing for seniors to support Applicants’ argument that this type of senior housing is needed in the County – “55+ Housing Preference Survey,” produced by the County’s Department of Parks and Planning (labeled “SR-5” in Applicants’ Technical



Appendix (Exhibit 34(b)); and “Beyond 50.05: a Report to the Nation on Livable Communities: Creating Environments for Successful Aging” produced by AARP (labeled “SR-7” in Exhibit 34(b)). 1/14 Tr. 221-226. In her opinion, this is not one of those zones that requires strict adherence to the Master Plan. 1/14 Tr. 228. She noted that the Master Plan was unusual in that it made a strong case for housing mix. Master Plan, p. 39 (Exhibit 67(d)). Also, the Plan takes a great deal of care via of the unit caps and the density, as well as this language, to develop these housing mix guidelines to oversee the housing mix in a way that many master plans do not do. Nothing in the Plan recommends a change to the RE-2 zone or a use other than residential. 1/14 Tr. 229-231.

In 1994, the P-R-C Zone did not permit its use on parcels that were under 750 acres. There have been three separate efforts to change that over the history of the zoning text amendments. In 2002, ZTA 2-05 split the P-R-C zone into two categories for properties 25 acres and properties of 750 acres. In other words, it reduced the required minimum lot to 25 acres from 750 acres. However, the 2002 ZTA, changed the minimum lot size, but it did not change the requirements for services. In 2006, ZTA 06-18 was introduced to allow the necessary uses and the services and the facilities to be accessible to properties that were of 25 acres, therefore no longer requiring the services to be provided on site. This amendment was never adopted, but in 2007, ZTA 06-27 was adopted to allow off-site services. This ZTA added language to the purpose clause, indicating that a smaller P-R-C may not have to contain all the services on-site, and such communities could alternatively be accessible to services. This change allowed a 25-acre site to enjoy the P-R-C without burdening it with the provision of on-site services that could be easily accessible off-site. That is the current language in the zoning ordinance today. 1/14 Tr. 232-233.

Ms. Russel noted that the Planning Board found that the Applicants’ proposal substantially complies with the Master Plan’s overall goals and that the site’s location within a short drive of shopping centers and other amenities, with a community center on-site and a park within walking

distance, satisfied the requirement in the purpose clause for adequate access to day-to-day and recreational services. 1/14 Tr. 232-235.

Ms. Russel added that the Council made a huge statement in 1994 by indicating that this is a transit-oriented community. Although the transit is not there yet, transit needs density in order to survive and in order to have success. She believes that the density that would be enjoyed on this site will also help contribute to the viability of the community. 1/14 Tr. 235-236.

Ms. Russel opined, based on her unique perspective as the first Clarksburg ombudsman, that this application is in accordance with the public interest and ultimately benefits Clarksburg. 1/14 Tr. 240.

4. Kathryn Kubit (1/14 Tr. 251-273):

Kathryn Kubit testified that she is a vice-president with Elm Street Development. She stated that Elm Street Development is the largest green field developer in Montgomery County. The company has been active in Clarksburg for over 30 years, acquiring land, helping with the 1994 Master Plan and developing Clarksburg Village, which is a community nearby this one. Elm Street is also responsible for building the connection of Snowden Farm Parkway from Maryland 27 to Clarksburg Village. Clarksburg Village is a 2,700 unit community, and she is here to voice Elm Street's "very strong support for this particular project and the local map amendment for this project." 1/14 Tr. 251-252.

Clarksburg Village has about 1,000 units built, and in the next one to two years, in addition to several hundred additional units, they plan to have an elementary school built and a retail area. Many facilities are being developed, including a large park in Clarksburg Village nearby this community, an additional recreation center, a pool and trails. Elm Street is also planning an affordable multi-family, senior housing project in Clarksburg Village for 100 low-income seniors. However, that project is very different from this one. It will be rental housing, affordable and multi-family. There is no other

senior or active-adult community in Clarksburg, and she feels that this is a disservice to the Clarksburg community. Ms. Kubit gets many questions from residents about getting some place where their parents can move. 1/14 Tr. 252-254.

Given the lack of such housing up-county, Elm Street was very excited to hear that Mr. Butz was going to propose an active adult community for his particular property, and they have partnered with Mr. Butz to identify synergies between their projects. So far, they have worked together on infrastructure building, in particular, Snowden Farm Parkway, as well as some utilities work. In addition, Elm Street also extended the invitation to Mr. Butz that if his community were to get approved, that they could join Clarksburg's HOA if they wanted to do so. 1/14 Tr. 254.

When asked on cross-examination whether this agreement was in writing, Ms. Kubit replied that there is a general agreement in writing, but it's a very rough draft at this point. However, it is a written invitation that's been signed, at this point, for Applicants to join the HOA if they wish to do so. Currently, the HOA is not an independent body from Elm Street, and it will not be until many more houses are built. Ms. Kubit does not anticipate that the addition of 140 units would be problematic at all from the management perspective. [Mr. Kline indicated that the HOA for Clarksburg Village is included in Exhibit 34(b) as CV-2, 3 and 4.] Ms. Kubit agreed to provide a list of whatever other amenities that would be available to the residents of this proposed community as part of the HOA agreement. She also agreed that the primary entrance to Clarksburg Village will be through the Butz Farm along the future Snowden Farm Parkway [*i.e.*, A-305]. 1/14 Tr. 255-265.

When asked whether there are financial agreements between, or anticipated between, Clarksburg Village and the owners or developers of the Butz property, Ms. Kubit replied that there is no major financial gain for Elm Street to be at the hearing supporting this project. There are some agreements and there is some money exchanging hands, but it has nothing to do with the integration of

the Butz Development. It has to do with the road right-of-way that Elm Street is acquiring through the community. That is a completely separate issue. 1/14 Tr. 266-272.

On re-direct, Ms. Kubit testified that the community center for Clarksburg Village is about 1,300 square feet, which is adequate for the residents it serves, and another of about the same size is being built, and it will have a pool house connected to it. 1/14 Tr. 273-274.

5. Wes Guckert (1/18 Tr. 17-68):

Wes Guckert testified as an expert in transportation planning. Mr. Guckert prepared a traffic impact study (Exhibit 38(a)) of the intersections specified by Technical Staff – Route 27 at both Brink Road and at Skylark Road. Included are background developments, which are approved developments that have not yet been completely constructed. Those developments are Clarksburg Town Center, Clarksburg Village, Greenway Village, and Goddard School. Mr. Guckert testified that he followed the standard LATR guidelines, for Local Area Transportation Review. He thus determined, using Montgomery County trip generation rates, the amount of traffic that would be generated by the four background developments, and assigned that traffic to the studied intersections. He then determined the amount of traffic that would be generated by the subject property, utilizing the Institute of Transportation Engineers trip generation formula for senior adult housing (Exhibit 91). Mr. Guckert estimated that that the 140 senior units would generate about 30 morning peak hour trips, and about 38 evening peak hour trips (Exhibit 38(a), p. 21). He assigned 85 percent of the traffic to and from the south along Route 27, which was found to be acceptable by all the reviewing agencies, and the rest of it spread throughout north on MD 27, Brink Road and Snowden Farm Parkway. Mr. Guckert then determined the total peak hour traffic by standard critical lane volume (CLV) analysis, using the procedures set forth in the guidelines. He found that the studied intersections at Route 27 and Snowden Farm Parkway (A-305), Brink Road, and Skylark Road, would all fall within the acceptable

standards determined by the Planning Commission staff, which is a CLV of 1,425 during the peak hour, as indicated in the Technical Staff report (Exhibit 53, p. 7). 1/18 Tr. 17-23.

Mr. Guckert further testified that in his opinion, there is no need for transportation network improvements before Applicants have occupancy and traffic generation from the proposed units. He noted that the Planning Staff concurred with his methodology, analysis and calculations. The State Highway Administration also concurred with his report and findings (Exhibit 90). Mr. Guckert concluded that the surrounding transportation network is adequate to handle the traffic that would be generated by the proposed development. 1/18 Tr. 26-28.

PAMR is an acronym for Policy Area Mobility Review. PAMR is a lump sum tax that would have to be paid for purposes of zoning, and it's about a \$46,000 tax overall for the project. It is derived by first looking at the amount of traffic that is generated. The Courts at Clarksburg, is in the Clarksburg policy area. For fiscal year 2012, 10 percent of the new trips must be mitigated or have a fee of \$11,700 for 10% of the trips, which yields four trips times \$11,700, so that the resulting PAMR mitigation payment, is \$46,800, as shown on page 26 of his traffic impact study.

PAMR has now been superseded by another acronym called TPAR, Transportation Policy Area Review. TPAR has now become simply an additional tax as it is related to money that developers or home builders need to pay to the County. In this particular area, while the rules are still being tightened up, it's likely that the TPAR tax for this project will be on a per unit basis at a rate of about 25 percent of the transportation impact tax, and paid in addition to it. It will be in the range of \$600 to \$1,000 additional per unit. 1/18 Tr. 28-32.

In Mr. Guckert's opinion, the proposed circulation systems for pedestrians, vehicles, and bicycles will be safe, adequate and efficient. 1/18 Tr. 33. He estimates that the top third of the development, north of A-305, will exit onto A-305. The middle half of the project will likely exit

onto A-305, as well. The southern half of the project for the most part, is likely to exit out onto Brink Road. With about 40 peak hour trips, there will be about one car every four to five minutes coming out each of the three entrances. It will have a really small impact. Mr. Guckert further testified that in his opinion, the access and the sight distance at the Brink Road access point would be safe and satisfactory. He opined that a crosswalk located around the southern access point to the project, crossing Brink Road, would be a safe crossing point for pedestrians. The sight distance that's required by the Department of Transportation is not just for cars. It's for pedestrians as well. In his opinion, there would be no safety issue in establishing a crosswalk at that point to give residents of the proposed project access to the park south of Brink Road. The proximity of the access driveway and the crossing to the intersection of 27 and Brink Road, which is signalized, helps create the gaps and opportunities to cross. 1/18 Tr. 33-37.

On cross-examination, Mr. Guckert testified that it takes about five seconds for a pedestrian to cross a two-lane road, which is what Brink Road is at the southern access to the site. He is not aware of any plan to expand it to four lanes. This kind of road would typically carry a 30 mile per hour speed limit. The speed limit on Ridge Road is 40 miles an hour north of Brink Road, and 45 miles an hour south of Brink. 1/18 Tr. 38-41.

Mr. Guckert also further explained how the figure for the likely number of new trips is determined. That number came from national statistics that are used by the planning staff and by the State Highway Administration. Not everyone goes to work at the same hour. Projecting 40 trips for these units in the peak one hour means other folks that are coming and going in the hour before, and other folks that are coming and going in the hour after. There's a three-hour peak period, and this is the peak one hour within that three hours. The source of the senior housing standard he used is the Institute of Transportation Engineering, ITE Land Use Code 251, for senior adult housing, detached (Exhibit 91). According to Mr. Guckert, the transportation engineering field does not change their trip



rates based upon whether you switch from 49 years old to 50 years old, or from 59 to 60. There are a variety of people that live in these types of active-adult communities, and he has found the ITE projections to be quite accurate. He indicated that neither delay nor queuing analysis was asked for by Technical Staff nor done in this case. 1/18 Tr. 43-51.

Mr. Guckert testified that if this were non-senior, regular development, this number of houses would generate in the range of about two and a half times more traffic. The trip rates used here are representative of active adult communities without children. He took into consideration the impact of A-305 and Route 27, not any additional traffic in the future on M-83, because of its uncertainty in the County. Although M-83 is on the Master Plan, M-83 from MD 27 down to Brink Road, is not funded, and therefore under the County's guidelines, it is not taken into account. 1/18 Tr. 51-56.

Mr. Guckert stated that A-305 will be a four lane road, consisting of 24 feet of roadway, then a median, then another 24 feet. That is different from the right-of-way width, which is much larger than the road width. He noted that active adult communities are typically ages 50 to 70, and without children. On redirect, Mr. Guckert mentioned that the peak one hour at this location is in the morning between 6:45 to 7:45; on the evening, it was 4:45 to 5:45 at MD 27 and Brink Road. 1/18 Tr. 58-65.

6. Dusty Rood (1/18 Tr. 69-89):

Dusty Rood testified as an expert in environmental planning, water quality and forest conservation. He noted that the property is within the Clarksburg special protection area, which is an overlay zone, applied to this part of the County for the explicit purposes of providing an additional level of water quality protection through the development review and construction process. Along with that requirement come specific requirements addressed through the Montgomery County environmental guidelines specific to water quality, specific to impervious surface reductions, and related to forest conservation. 1/18 Tr. 71.

Mr. Rood testified that it has increasingly become public policy, at the Federal, State and local level, to deal with the issue of protecting the Chesapeake Bay by reducing the amount of nutrients, specifically nitrogen and phosphorus reaching the water. The preliminary water quality plan addresses this issue and proposes the approaches that the Applicants will take to ensure the performance goals are met and the water quality objectives are achieved. For this property, that water quality plan starts with understanding the existing conditions of the property. Excluding the right-of-way for A-305, there is approximately two-tenths of an acre of forest. The rest of the property is in a rotation of crops and agricultural use. The nature of that use presents a challenge to water quality, in and of itself, through the ongoing application of fertilizers and herbicides to manage the agriculture, as well as the cultivation, tilling, and seasonable tilling of the soil, and turning it over, exposing it to erosive forces. The water quality plan addresses this issue through integration of “best management practices” (BMPs) and environmental site design, which seeks to create a hydrologic condition comparable to woods in good condition. It does that by decentralizing and distributing smaller best management practices throughout the property, which will ultimately reduce the amount of runoff, and prevent runoff from accumulating. That runoff then filters naturally through mulch and other soil media. Although this project is not subject to an impervious surfaces cap, Applicants will minimize impervious surfaces to the extent feasible for the project. The preliminary water quality plan was approved by the Department of Permitting Services (Exhibit 53, Attachment 14) and by the Planning Board (Exhibit 89(b)). 1/18 Tr. 72-75.

Mr. Rood further testified that the next measure which is employed to help protect water quality is through substantially increasing the amount of ultimate forest cover on the property. Through the forest conservation plan, which Planning Staff also recommended for approval and the Planning Board approved (Exhibit 89(a)), Applicants will be adding approximately 7.2 acres of additional forest to the property, which is more than 35 times the amount of existing forest there

presently today. Exhibit No. 41(c), which is the preliminary forest conservation plan that the Planning Board eventually approved, shows the general locations that will be placed within a category one conservation easement, and which will be planted using native species as part of the development plan. Applicants located the planting areas and the forest areas in places that also complimented other plan objectives, such as transitioning the property and providing some buffering to the adjacent properties to the west. The largest of the three planting areas, at about 2.8 acres, is called Area B, which is along the western edge of the property. All three of these planting areas will probably be planted with a mix of evergreen and deciduous species. It would be appropriate within these areas to plant American hollies, eastern red cedar, perhaps white pine, as well as other deciduous species, to create a diverse forest community that will eventually succeed into a larger mature forest over time. These areas will be protected in perpetuity through a category one conservation easement, which is the most restrictive of easements that is entered into with the Planning Board, and then they enforce that easement to ensure that no encroachments are occurring. 1/18 Tr. 75-77.

Mr. Rood stated that sewer service will be provided through the public sewer and not through private septs. That is another key way that would help to minimize the amount of nutrients, particularly nitrogen from entering the watershed. Homes that are built on private septic systems load as much as 10 times the amount of nitrogen into the watershed as do public sewer facilities that treat them in a centralized wastewater treatment plant such as the Seneca Wastewater Treatment Plant. Also, by connecting into the public water system, Applicants would not be utilizing on-site wells which would extract water from the local aquifer. 1/18 Tr. 77-78.

Given the nature of this use as an active-adult community, the yards and the landscaped facilities will be maintained by a common landscape contractor, as opposed to effectively 140 individuals taking care of their lawns. As such, it's much easier to control not only the aesthetics of the community, but also how the lawns are cared for, including restricting fertilization in order to

prevent runoff of nutrients. All of those measures combined will actually help to reduce the amount of nitrogen, phosphorus, and sediment that's currently running off the property. Nitrogen will be reduced by at least 18 percent, phosphorous and sediment by more than 50 percent from the existing condition, just simply by the nature of the land uses and the combination of the practices that are proposed for this site. Mr. Rood mentioned that the property has a natural resource inventory that was approved by the Park and Planning Commission Staff. 1/18 Tr. 80.

Mr. Rood opined that the measures he described will contribute to satisfying water quality goals of the Master Plan and will contribute to the Plan goal of creating a transition in the green belt, the separation between Germantown and Clarksburg. Moreover, the forest conservation plan along the west and on the north would block, or at least create filtered views, between the existing residences and the new residences within the community. Given the present dimensions of the proposed stormwater management facilities, Applicants are limited in what they can do to supplement the hedgerow buffering the residences to the west. If the stormwater management facilities could become narrower, Applicants would have an opportunity to plant along the property line. There would need to be at least a 50-foot wide area in order to qualify for being placed in a forest conservation easement, but one could still plant within a smaller area, even if it did not receive forest conservation credit. 1/18 Tr. 81-83.

Mr. Rood does not believe that the lack of runoff from this 54 acre site will affect the wells on the property to the west. The dry ponds may be reconfigured but must remain where they are placed because of the natural drainage divide on the property. He opined that the amount of potential stormwater runoff from the property would not exceed that which would runoff from woods in good condition. Mr. Rood also testified that ongoing maintenance will help to ensure that areas that are supposed to infiltrate water will continue to infiltrate water, to prevent standing water which is what

creates the environment for breeding mosquitoes. Thus the environment will not be present for the growth of mosquito larvae. 1/18 Tr. 83-89.

7. Frank Bossong (1/18 Tr. 90-130):

Frank Bossong testified as an expert in civil engineering. He stated that Applicants' proposals meet the County requirements with regard to stormwater management. Applicants will also minimize the amount of grading that has to take place in order to develop this project. The State of Maryland requires that Applicants meet environmental site design (ESD) standards. Exhibit No. 34(s) basically illustrates the different type of stormwater management facilities that are being proposed on the project. The orange symbols, which are scattered throughout the project, are bio retention facilities, and the lighter green areas, are extended detention dry facilities. Grass swales will help transport some of the water to infiltrate back into the ground. Downspouts spread the water out, promulgating infiltration into the ground. This network of ESD facilities maximizes the amount of ground water recharge back into the ground and will meet the full ESD requirements through ESD measures. This will bring the entire property back to a level of woods in good condition. The amount of runoff will be less than what's happening today with the plantings and the farming operations. None of these measures will hurt the well systems off the property. These measures will meet all State and County requirements. 1/18 Tr. 91-98.

Mr. Bossong further testified that even if both the dry ponds on the west were made smaller, so as to allow for a greater amount of screening in those areas, Applicants could still meet all of the environmental site design requirements, both for the State and the County. He also noted that there is going to be an abundance of landscaping throughout the subdivision, through street trees and the like, as well as home landscaping. Even in the area to the northern pond, there will be street trees abutting the roadways, which will create some visible aesthetics and some screening. 1/18 Tr. 98-101.

Mr. Bossong stated that the dry ponds typically accumulate two to four feet of water, which dries up over a 12-hour period. In his opinion, State and County requirements would be met even without these dry ponds, but they would help to reduce any flow off of stormwater onto the neighbors in big storms. He noted that Applicants had worked to minimizing the amount of sediment and earth moving, and have agreed with the County agencies that the sediment control measures during construction will be designed at a capacity of 125 percent of what is required. 1/18 Tr. 103-106.

Since this is an age-restricted development, Bruce Chrispell of Montgomery County Public Schools indicated that there will be no school children generated, so there will be no impact on area schools. Exhibit 53, Attachment 7. The closest police station is the Germantown Police station, which is approximately 2.1 miles away. There are four fire/rescue facilities within this area. They are adequate to service this area. 1/18 Tr. 107-108.

Mr. Bossong further testified that Public water is available for this property. There are existing 16 inch, 24 inch, 48 inch lines in Maryland Route 27. There is an existing 16 inch water main in Brink Road as well, so water access capacity is not an issue at all for this property. However, when the 1994 Master Plan was adopted, there were sewage capacity and conveyance issues for the area of the subject site. The Crystal Rock Pump Station and the Seneca Waste Treatment Plant had capacity issues, and there was no way to bring sewer from this part of the County to the Seneca Wastewater Treatment Plant. In his opinion, that is why the subject site was designated of RE-2. In 2001, the County Council amended the comprehensive water and sewer master plan for development of this area. Capacity was then available at the sewage treatment plant, and at the Crystal Rock Pump Station. A conveyance system (a trunk line) also became available just to the south of the Clarksburg Village subdivision, which would allow this area of the County to have sewer conveyance from the east to the west. Given these new capacities, on March 27, 2001, the County Council changed the designation of sewer category for the subject property from W6-S6 to W1-S3, predicated on a "PIF," a private



institutional facility (*e.g.*, a church) being built. In 2009, when this rezoning application was submitted, Applicants also submitted a request that the category change not be restricted to a private institutional facility. In July of 2011, the County Council deferred action on the category request pending the outcome of the application to rezone the property to P-R-C [Resolution 17-217]. The WSSC indicated that water capacity and sewer capacity are available for the proposed development (Exhibit 53, Attachment 5). 1/18 Tr. 109-111.

In 2012, the Maryland legislature passed the Maryland Sustainable Growth and Agricultural Preservation Act of 2012, which requires local jurisdictions across the State of Maryland to create a tier plan for availability of public sewer versus septic fields. This action was based on a concern with the amount of nitrogen runoff going into the Chesapeake Bay, much of which comes from septic fields. Montgomery County, through Park and Planning, came up with tier maps. Exhibit No. 92 is a Tier Map covering the subject site. It designates the subject site as within “Tier II: Future Growth Areas Planned for Sewer.” In September of 2012, the Council adopted SRA-12-01 [Ord. 17-2], which requires public sewer service in any area specified for Tier II. Mr. Bossong suggested that if Applicants applied for one or two acre lots with septic systems, the Planning Board would likely reject it because it does not fit into the proper tier that the Council has mandated. 1/18 Tr. 112-117.

Mr. Bossong testified that Exhibit No. 34(t) shows a preliminary water and sewer layout. WSSC has reviewed this as part of their approval letter. Sewage will be collected by gravity to a sewer line that will be proposed in Snowden Farm Parkway, traveling east to west to a proposed cul-de-sac in Clarksburg Village, which will be called Castle Oak Court. 1/18 Tr. 118-120.

Summation by Applicants’ Counsel 1/18 Tr. 187-197:

Applicants’ counsel, Jody Kline, summarized their case: He challenged Technical Staff’s finding that Applicants had not provided adequate transition in density between the two planning

areas. The Master Plan includes a section about creating a transition and supplementing the green belt between Germantown and Clarksburg. Applicants tried to push the density in their project a little bit further to the north to be able to supplement the green belt and create the transition in the southeast corner on the west side, to some extent, and on the east side. The Planning Board basically concluded that Applicants did a good job of that, in their letter, stating “You meet the overall goals in density of the Brink Road transition area and provide an appropriate transition.” Regardless of what the density should have been, Applicants still achieved the transition, which was the driving force in the Master Plan.

Technical Staff mentions that the project requires public sewer and water that’s not recommended in the Master Plan. Mr. Kline notes that the 1994 plan was predicated on a misunderstanding of being able to sewer the property. That has now been overcome. Sewer is available and Applicants have been able to overcome the physical problems with getting sewer on the property.

Technical Staff is also locked into the density issue. Mr. Kline argues that represents a lack of adaptability to the current situation which would justify the kind of project proposed.

Technical Staff also stated that, “The project does not meet the purpose clause of the P-R-C zone.” Staff argues that it does not contain the day-to-day services generally anticipated with a planned unit development. However, as testified by Ms. Russel, in a P-R-C Zone of this size, and in this case 50 acres plus, Applicants are not expected to provide a retail center like Leisure World has along Georgia Avenue. Mr. Kline argued that so as long as people can get to the services, including both recreational facilities, as well as those services needed by the people who would be relying on them in the community, then Applicants satisfied the purpose clause.

Mr. Kline argued that contrary to Technical Staff's finding, Mr. Unterberg has introduced multiple sheets showing that Applicants are able to meet the recreational requirements on-site that the Planning Board would have approved at the time of site plan.

Compatibility is addressed on page 15 of the staff report, and it's phrased this way. "We find that the proposed uses are similar in nature to the uses surrounding the property." Page 15 at the top of the paragraph, which is paragraph number two entitled, compatible surrounding area. Five lines below that it says, "The density, however," and this, Mr. Kline argues, is the theme driving the Staff, "The density, however, is two and a half times the upper limits of what the master plan recommends, and the clustering of houses is not characteristic of the surrounding rural character of Green Ridge Acres and Brink Meadows." In the last line Staff says, "Clustering and higher densities proposed do not align with the vision of the master plan." Mr. Kline noted that nowhere did Staff say that a house on two acres is incompatible with a house on a 7,000 square foot lot. It still goes back to the master planning density issues, and Staff thinking that they are inherently incompatible. He argued that the screening, the large setbacks, and trying to maximize the amount of vegetation between the two, to result in blocked views or filtered views, should result in a compatible situation between the two properties in that location. [Kline closing, 1/18 Tr. 193-194]

Basically, on that point, the Planning Board said that the arrangement of units, coupled with the forest buffers and the setbacks, provides compatibility with the surrounding neighborhood. [Kline closing, 1/18 Tr. 195-196]

Mr. Kline argued that the Staff didn't give Applicants any credit for the number of public benefits that flow from the application. A lot of the things Applicants are trying to achieve today weren't even really contemplated at all in 1994. The stormwater management will result in less water coming off the property than today. Mr. Rood talked about the environmental enhancement, with the

nitrogen loading on the property because of the agricultural activities on the property. There would be a substantial improvement consistent with all the Chesapeake Bay environmental preservation ideas.

The application also addresses the need for senior housing in the area, a point that Ms. Russel also stressed. Mr. Butz in the appendix established that this is a product that the County really needs. And then Ms. Kubit acknowledged that Applicants' product gives the Clarksburg Village, and then this area, a full life-cycle community.

Those public benefits, which staff really didn't identify at all, are what really rounded out the application in the context of satisfying all the technical requirements and serving the public interest. He concluded that it was just the right thing to do at this time in the world, 2013, rather than 1994. Kline Closing 1/18 Tr. 196-197.

### **B. Opposition Witness**

#### 1. Mary Jane Goodrick on behalf of GGCA (1/14 Tr. 93-94; 1/18 Tr. 173-185):

Mary Jane Goodrick stood in for Mr. Goldberg on behalf of GGCA, and Mr. Goldberg offered no testimony. 1/14 Tr. 93-94.

Ms. Goodrick asked whether the January 16, 2013 letter from Elm Street Development (Exhibit 80(c)) was a binding commitment from Elm Street to allow residents of the proposed development to have access to the amenities at Clarksburg Village. The Hearing Examiner responded that this was the opportunity for her testimony and not to ask for essentially a legal opinion. Ms. Goodrick responded that she is concerned that there would be adverse effects on the Butz property in Elm Street's offer is rescinded. 1/18 Tr. 173-175.

Ms. Goodrick also expressed concern about the safety of the seniors who would be living in the Butz property, given that A-305, which goes through that property, which will create a tremendous

number of vehicles and traffic to and from Clarksburg. Ridge Road and Brink Road will also carry a large amount of traffic. M-83 is going through the process of investigation by DOT about whether M-83 will be completed or not. If it is, that traffic will begin at Goshen and Mid-County, large roads; it will pass through Montgomery Village Avenue and go north. It will be a huge feeder road, terminating at the intersection of MD 27 and Snowden Farm Parkway. It will have a light, but it is already a huge road. She asked whether a community of 50 year olds, 60 year olds, 70 year olds, 80 year olds, and 90 year olds are expected to be able to cross those large roads. Ms. Goodrick pointed out that the purpose clause of the P-R-C Zone calls for “a maximum of safety.” It also calls for “a maximum coordination between the development and its surrounding uses.” Under the proposal, if you are living in that property, you have to cross a major road to get out of it. If you are a senior, and not all seniors drive, you would have to be crossing these major roads, or you would have to get into your car and get onto these major roads, which will be increasing in traffic. The Hearing Examiner explained that if the Council approves a rezoning, issues of traffic safety will be more closely examined at Subdivision and Site Plan review. Therefore, at the rezoning stage, the Council is more likely to address the question of whether it is reasonable to conclude, based on this development plan, that safe access and a safe traffic situation can be developed on this site. 1/18 Tr. 175-181.

Ms. Goodrick further testified that the Greater Goshen Civic Association is opposed to this zoning change due to the proposed density and the concerns of seniors who are being placed in a property that is surrounded by major traffic, while being unable to exit the property without crossing a major road, whether by a pedestrian or by a vehicle. GGCA also wants to “make sure that the development remains as a P-R-C and that it not be allowed to convert to some other type of housing.” 1/18 Tr. 181. [The Hearing Examiner assured her that the zone could not be changed without Council approval.]

Ms. Goodrick further testified that nearby, there is a lot of other senior housing in the County – Asbury, Leisure World, Meadow Ridge, Churchill, King Farm Lutheran Home. She stated that Asbury has 1,240 units, with some single-family detached homes and some attached homes. It is located at Odenthal and Russell Avenue. She offered to provide a list. Meadow Ridge is a disabled and senior citizens complex of individual homes that is at Wightman and Prather town Road. Ms. Goodrick wasn't sure about the other facilities, so the Hearing Examiner gave her 10 days to submit a list of these other senior facilities and a description of what type of facilities they are, where they are located and the number of units. 1/18 Tr. 182-185.

2. William Hancock (1/14 Tr. 5, 111-112, 286-294; 1/18 Tr. 125-126, 171-172, 197-198):

William Hancock lives at 21721 Brink Meadow Lane, in the Brink Meadows subdivision, adjoining the Butz property. He raised the question of how the age restrictions would be enforced. He felt that the homeowners association is not going to enforce a rule that there can't be children living in the development. He stated that the regulations for Montgomery County are that only one person in the home has to be 50. He mentioned that one community couldn't sell the houses with this limitation on it for age, and they ended up converting the houses from the age restriction to no restrictions at all. 1/14 Tr. 111-112.

Mr. Hancock further testified that he "built" the 22 houses in the Brink Meadow subdivision immediately to the west of the subject site. He physically designed the houses as an architect, and physically built the houses. When people bought these houses, they signed a contract which indicated that they had reviewed the Master Plan, and the Master Plan didn't say anything about the kind of density sought in this case. He feels that the County has a responsibility not to allow a development of

this density in this area of two-acre properties, with million dollar houses. Even today, the Master Plan doesn't show any possibility of the proposed project. 1/14 Tr. 286-288.

Mr. Hancock lives in a home that backs up to the Butz property, and he experiences a traffic problem all the time (1/14 Tr. 288-290):

At 6:00 in the morning, the traffic is dead stopped. At 6:00 in the evening, it's backed up clear to 355 going north. It's horrendous. When I come out, to come out of here, come out of Brink Meadow Lane and get onto Brink Road, we back up three or four cars in the morning quite often. And getting out of there, it's damn near worth your life.

He added that there is a blind hill and cars come down at 45 to 50 miles an hour.

Mr. Hancock further testified that he is very upset about the density and having townhouses backing up to five-acre lots. Although the plans may illustrate detached units, because they cost less, if they can put in townhouses, Mr. Hancock opined, they're going to do it. "This just is not right. They should be single-family [detached], should not be townhouses in this at all." 1/14 Tr. 293-294.

On cross-examination, Mr. Hancock admitted that when he built the homes in Brink Meadows, the land was zoned R-200 [*i.e.*, half-acre lots, not two-acre lots], as was the Butz property. Also, when he bought his property, and started building houses, the Master Plan that the people looked at prior to 1994 recommended R-200 zoning on the Butz property. 1/14 Tr. 294-297.

At the second day of the hearing, Mr. Hancock expressed concern about the grassy hill that would be located as part of the northern dry pond near his home, feeling that it would be unsightly. He stated that he doesn't care how much water comes across onto his property. "It just makes a nice green grass. So, from my point of view, you could eliminate that pond." 1/18 Tr. 125-126.

Mr. Hancock also referred to a letter from Applicants' attorney stating that Applicants would not reduce the proposed density and that it is not economically feasible to reduce the number of units below 140. Mr. Hancock feels that there is "[nothing in the] regulations or laws that Montgomery



County owes Mr. Butz a living. . . . [If] the economics of less than 140 units aren't good, maybe he needs to find another way." 1/18 Tr. 171. [The Hearing Examiner assured Mr. Hancock that Mr. Butz's financial concerns were not a factor in his consideration. He will look only at the land use issues.]

Mr. Hancock also challenged Elm Street Development's strong support for this project, saying if it were such a great idea, why didn't they include it in Clarksburg Village before. 1/18 Tr. 171-172.

Mr. Hancock concluded that the opposition completely agrees with the staff at Park and Planning, and that this should be denied. He feels that Applicants are not precluded from developing their property as *e.g.* half acre lots. "This is not his only avenue of developing this property." 1/18 Tr. 197-198.

3. Ron Wills (1/14 Tr. 274-285):

Ron Wills testified that he is a resident of Brink Meadows, and that he has lived at 21732 Brink Meadow Lane for the past 23 years. He expressed confusion about the discrepancy between the recommendations of the Technical Staff and the Planning Board. Mr. Wills disputed the utility of the facilities at Ridge Road Recreational Park across Brink road from the subject site. He stated that the speed and volume of traffic has gotten so bad on Brink Road, he finds it too dangerous to cross Brink Road to try to go to the park. Moreover, "this is not in any way a senior's park." It's full of baseball fields and softball fields. There is one tennis court, and there are picnic benches, but they're surrounding a children's area, so it's not really an adult park in any way. 1/14 Tr. 274-279.

Mr. Wills also expressed concern about the safety of the intersection of Ridge Road and A-305. He estimates that the speed limit will be 40 mph and thinks it will be problematic, splitting the neighborhood in half. This will be a major entrance to Clarksburg Village, so there's going to be an amazing amount of traffic flowing across. There is also no real agreement to any of those

amenities [*e.g.*, Clarksburg Village] actually being there at this point. Mr. Wills states that he is left with a question as to whether this senior community will actually have access to amenities. He called them “false amenities.” Given this fact and the Technical Staff recommendations, he is shocked that the Planning Board voted to approve. 1/14 Tr. 281-285.